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No. 82-24

In the Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRANCIS FORD, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether an order of the Federal Trade Commission in an adjudicatory proceeding is unlawful because the agency failed to proceed by rulemaking rather than adjudication when articulating new legal standards of general application.*

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*The parties in the court of appeals were the Federal Trade Commission and Francis Ford, Inc.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	2
Reasons for granting the petition	7
Conclusion	21
Appendix A	1a
Appendix B	6a
Appendix C	7a
Appendix D	13a
Appendix E	57a
Appendix F	74a
Appendix G	139a

TABLE OF AUTHORITIES

Cases:	Page
Bahat v. *Sureck*, 637 F.2d 1315	15
Chrysler Corp., 97 F.T.C. 107	3, 4
Chuck Olson Chevrolet, 96 F.T.C. 37	4
Excelsior Underwear, Inc., 156 N.L.R.B. 1236	11
FTC v. *R.F. Keppel & Bros.*, 291 U.S. 304	13
FTC v. *Sperry & Hutchinson Co.*, 405 U.S. 233	13, 14
FTC v. *Standard Oil Co. of Cal.*, 449 U.S. 232	2
Ford Motor Co., 93 F.T.C. 402	3, 4
General Motors Corp., 95 F.T.C. 825	3, 4
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267	*passim*
NLRB v. *Wyman-Gordon*, 394 U.S. 759	1, 8, 9, 10, 12, 15, 17, 18
National Petroleum Refiners Association v. *FTC*, 482 F.2d 672, cert. denied, 415 U.S. 951	13
Patel v. *INS*, 638 F.2d 1199	15

Cases—Continued Page

SEC v. *Chenery Corp.*, 318 U.S. 80 9
SEC v. *Chenery Corp.*, 332 U.S. 194 ..... 7, 10, 15, 17, 18, 20

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. (& Supp. IV) 551 *et seq.* 9

5 U.S.C. 551(4) 9
5 U.S.C. 551(6) 9
5 U.S.C. 551(7) 9
5 U.S.C. (& Supp. IV) 553 ..... 9, 14
5 U.S.C. (& Supp. IV) 554 ..... 2, 9
5 U.S.C. (& Supp. IV) 556 9
5 U.S.C. 557 ..... 2, 9

Federal Trade Commission Act, 15 U.S.C. (& Supp. IV) 41 *et seq.* 7, 12

Section 5, 15 U.S.C. (& Supp. IV) 45 ..... 2, 3, 140a
Section 5(b), 15 U.S.C. (& Supp. IV) 45(b) . 8, 12, 140a
Section 5(c), 15 U.S.C. 45(c) 2, 142a
Section 5(m)(1)(A), 15 U.S.C. 45(m)(1)(A) 14
Section 5(m)(1)(B), 15 U.S.C. 45(m)(1)(B) .. 8, 13, 18, 19
Section 5(g), 15 U.S.C. 46(g) 13
Section 18, 15 U.S.C. (& Supp. IV) 57a 3, 14
Section 19, 15 U.S.C. 57b 2
Section 19(a)(1), 15 U.S.C. 57b(a)(1) 3, 143a
Section 19(a)(2), 15 U.S.C. 57b(a)(2) 2, 3, 20, 143a
Section 19, 15 U.S.C. 57b(b) 19, 143a

Or. Rev. Stat. § 79.5040(1973) 3

8 C.F.R. 212.8(b)(4) 15

Uniform Commercial Code (Cum. Supp. 1974): .....

§ 9-504 ..... 3, 5
§ 9-504(1) 3
§ 9-504(1)(a) 5
§ 9-504(2) 3
§ 9-504(3) 3, 5

Miscellaneous:

2. K. Davis, *Administrative Law Treatise* (1979) 14
K. Davis, *1982 Supplement to Administrative Law Treatise* 16, 18
40 Fed. Reg. 16347 (1975) 6, 18

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v.

FRANCIS FORD, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-5a) is reported at 673 F.2d 1008. The opinion and order of the Federal Trade Commission (Apps. D and E, *infra*, 13a-73a) and the initial decision of the administrative law judge (App. F, *infra*, 74a-139a) are reported at 94 F.T.C. 564.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 6a) was entered on August 24, 1981. A petition for rehearing was denied on April 5, 1982 (App. C, *infra*, 7a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent portions of Sections 5 and 19 of the Federal Trade Commission Act, 15 U.S.C. 45 and 57b, are set forth in Appendix G, *infra*, 139a-143a.

STATEMENT

1. The Federal Trade Commission ("Commission") is responsible for enforcing Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. IV) 45, which prohibits, *inter alia*, "unfair or deceptive acts or practices in or affecting commerce." Whenever the Commission has reason to believe that any person, partnership, or corporation has been or is using any unfair or deceptive act or practice, the Commission is authorized to issue an administrative complaint instituting an adjudicatory proceeding. If the respondent denies the allegations in the complaint, the case is tried before an administrative law judge (5 U.S.C. (& Supp. IV) 554). The administrative law judge's initial decision is reviewable by the full Commission (5 U.S.C. (& Supp. IV) 554 and 557). If the Commission finds, on the administrative record, that unfair or deceptive practices have been committed, it may enter a prospective order requiring the respondent to cease and desist from the unlawful practice.[1] Such an order is subject to judicial review in the court of appeals (15 U.S.C. 45(c)).

After entering a final cease and desist order, the Commission also is empowered under Section 19(a)(2) of the Act, 15 U.S.C. 57b(a)(2), to sue the respondent in district court seeking restitution, redress, or other relief for the benefit of injured consumers. To obtain such retrospective relief, the Commission must establish both that the challenged practices were unfair or deceptive and that a reasonable man would have known that they were fraudulent or dishonest (15 U.S.C. 57b(a)(2)).

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[1] See *FTC* v. *Standard Oil Co. of Cal.*, 449 U.S. 232, 241-242 (1980).

In addition to its authority to establish unfair or deceptive acts or practices through adjudication, the Commission is authorized to promulgate rules defining such acts or practices (15 U.S.C. (& Supp. IV) 57a). When the Commission proceeds by rulemaking, however, it may seek consumer redress only for acts or practices that occurred after issuance of the rule (15 U.S.C. 57b(a)(1)). To obtain such relief, the Commission need only prove that the rule was violated (15 U.S.C. 57b(a)(2)).

2. In 1976, the Commission initiated unfair practice proceedings under Section 5 against three automobile manufacturers (General Motors, Ford, and Chrysler), their financing subsidiaries, and three automobile dealers, including respondent Francis Ford, Inc., the second largest Ford dealer in Portland, Oregon. The complaints alleged,[2] *inter alia*, that the companies had systematically failed to pay credit customers whose automobiles had been repossessed the surpluses earned on resale of their cars. That practice, the complaints charged, violated Section 9-504 of the U.C.C. (Cum. Supp. 1974), which has been enacted by 49 states, including Oregon (Or. Rev. Stat. § 79.5040(1973)) (App. D, *infra*, 15a). Section 9-504 requires that when property subject to a security interest is repossessed upon default, the secured party must "dispose" of it in a "commercially reasonable manner" (U.C.C. § 9-504(3)) and must "account" to the debtor for any balance remaining after the indebtedness and certain "reasonable expenses" of the secured party are deducted from the "proceeds" obtained upon disposition (U.C.C. § 9-504(1), (2)). The complaints alleged that breach of the duty to repay surpluses was not only an "unfair practice" but also a practice likely to justify redress for previously injured consumers (see App. D, *infra*, 31a-32a & n.13).

Eight firms eventually entered settlements under which they agreed both to desist from the challenge practices and to

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[2] See *Ford Motor Co.*, 93 F.T.C. 402-406 (1979); *General Motors Corp.*, 95 F.T.C. 825-830 (1980); *Chrysler Corp.*, 97 F.T.C. 107 (1981).

repay more than $2.5 million in surpluses that had been withheld from consumers.[3]

Francis Ford contested the complaint against it, and a two-week trial was held. In sworn testimony, Francis Ford officials offered several contradictory descriptions of their repossession practices (App. D, *infra*, 17a-20a), but the Commission assumed *arguendo* that the firm had actually followed the least objectionable method (*id.* at 20a). According to that method, when Francis Ford received a repossessed car, it would make its own private estimate of the car's wholesale value and would treat that estimate as the "proceeds" obtained upon disposition *(ibid.)*. Since the dealer's estimate was invariably less than or precisely equal to the amount still owed by the debtor, Francis Ford considered that it was not obligated to pay any surplus *(ibid.)*. However, when Francis Ford actually resold repossessed automobiles, the proceeds obtained exceeded the amount still owed by the debtor plus Francis Ford's reasonable expenses for 43 of approximately 180 cars resold during 1974 and 1975 (App. D, *infra*, 17a; App. F, *infra*, 88a, 102a, 108a).[4]

The administrative law judge concluded that Francis Ford had committed an unfair practice by systematically failing to pay surpluses as required by the U.C.C. (App. F, *infra*, 108a-115a), and the Commission sustained that determination on

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[3] See *Ford Motor Co.*, 93 F.T.C. 402, 406-421 (1979); *General Motors Corp.*, 95 F.T.C. 825, 831-853 (1980); *Chuck Olson Chevrolet*, 96 F.T.C. 37 (1980); *Chrysler Corp.*, 97 F.T.C. 107, 139 (1981). Certain prohibitory portions of these orders are subject to "most favored corporation clauses."

[4] Francis Ford did repay a handfull of those 43 surpluses after receiving a letter from the FTC staff questioning its repossession practices and after receiving advice from counsel that it should do so (App. D, *infra*, 18a n.5; App. F, *infra*, 94a). Francis Ford thereafter retained new counsel and resumed its prior practice of neither paying such surpluses nor notifying customers of their existence (App. F, *infra*, 94a-95a).

appeal (App. D, *infra*, 27a-29a). Citing extensive case law under the U.C.C., the Commission held that a dealer holding a security interest in a repossessed car may not discharge its duty to dispose of collateral in a "commercially reasonable" manner (U.C.C. § 9-504(3)) merely by making a private estimate of the value of the collateral (App. D, *infra*, 20a-21a). The Commission concluded that an actual disposition of the collateral is required (*ibid.*). Turning to the only disposition of repossessed vehicles made by Francis Ford—sales at retail—the Commission rejected Francis Ford's contention that the provision of U.C.C. § 9-504(1)(a) permitting the secured party to recoup "the reasonable expenses of retaking, holding, preparing for sale or lease, selling and the like" allowed a deduction for general firm overhead or for a second profit on resale (App. D, *infra*, 22a-26a). In any event, the Commission noted, Francis Ford had not even attempted such calculations except in isolated instances after receipt of a letter from the FTC staff questioning its prior practice (*id.* at 18a n.5, 22a n.8). See page 4, note 4, *supra*.

The Commission entered an order virtually identical to the consent agreements reached earlier with the other parties. Under that order, Francis Ford was prohibited from continuing to withhold surpluses from its customers in the future (App. E, *infra*, 62a-64a). The Commission's opinion also stated that the case might warrant a suit for consumer redress on behalf of individuals from whom surpluses had been wrongfully withheld, but the Commission stated that it would reserve final decision on that question (App. D, *infra*, 36a).

3. On petition for review, the court of appeals vacated the Commission's order (App. B, *infra*, 6a), stating that "[t]he narrow issue presented here is whether the F.T.C. should have proceeded by rulemaking in this case, rather than by adjudication" (App. A, *infra*, 2a). The court held that (*id.* at 3a) "an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application." The court stated that the Commission's construction of U.C.C. § 9-504 was unprecedented (App. A, *infra*, 4a), that there had

been no prior notice of the Commission's interpretation *(ibid.)*, and that the Commission could have formulated its position in a proposed trade rule on credit practices *(ibid.)*.[5] The court concluded (*id.* at 5a):

> Ultimately, however, we are persuaded to set aside [the Commission's] order because the rule of the case made below will have general application. It will not apply just to Francis Ford. * * *
>
> Under these circumstances, the F.T.C. has exceeded its authority by proceeding to create new law by adjudication rather than by rulemaking.

The Commission filed a petition for rehearing and a suggestion for rehearing en banc. Amicus curiae briefs in support of the Commission's position were filed by the United States, the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Energy Regulatory Commission, the Federal Maritime Commission, the Interstate Commerce Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, and the Securities and Exchange Commission. Rehearing was denied (App. C, *infra*, 7a).[6] Dissenting from the denial of rehearing, Judge Reinhardt observed that the panel's decision conflicts "with the general principles of administrative law, previously enunciated by the Supreme Court" (*id.* at 8a). He added (*id.* at

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[5] The Commission's "Notice of Proposed Rulemaking" appears at 40 Fed. Reg. 16347 (1975). The proposed rule (which has not as yet been adopted or rejected by the Commission) would, *inter alia*, require creditors to credit a debtor with the fair market retail value of repossessed collateral for purposes of calculating any deficiency judgment. However, nothing in the proposed rule would require a creditor to refund a surplus withheld in violation of existing state law, which is the subject of this case.

[6] In accordance with Ninth Circuit practice, the number of judges voting for rehearing was not revealed (see App. C, *infra*, 10a-11a n.1).

8a-9a): "Unless the Supreme Court grants certiorari, and applies a different standard than we appear to be adopting, government agencies will be required to ask us on a case by case basis to limit, narrow, and explain away the overly broad rationale set forth in the opinion."

REASONS FOR GRANTING THE PETITION

Thirty-five years ago in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 200-203 (1947) *(Chenery II)*, this Court rejected the argument that a federal administrative agency must employ rulemaking rather than adjudication when articulating new legal standards. The Court stated (*id.* at 203): "There is * * * a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." In succeeding years, this Court has reiterated that cardinal rule of administrative law. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-295 (1974); *NLRB* v. *Wyman-Gordon*, 394 U.S. 759, 765-766, 772 (1969). In this case, however, the court of appeals held (App. A, *infra*, 3a; emphasis added) that "an agency *must* proceed by rulemaking if it seeks to change the law and establish rules of widespread application." The decision below is thus squarely contrary to this Court's established precedents and merits summary reversal. As Judge Reinhardt aptly put it in dissenting from the denial of rehearing en banc (App. C, *infra*, 10a): "The panel's opinion pays lip service at most to the basic principle that 'the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.' * * * While repeating the rule, the panel opinion gives it no weight and no significance * * *."

Not only is the court of appeals' decision in direct conflict with this Court's decisions, but it is devoid of any authoritative support and is inconsistent with provisions of the Federal Trade Commission Act, 15 U.S.C. (& Supp. IV) 41 *et seq.* That Act plainly contemplates that the Commission may employ adjudicatory proceedings, as it did here, to define "unfair or

deceptive acts or practices" (see 15 U.S.C. (& Supp. IV) 45(b)) and that such adjudications may result in new interpretations of the law that bind non-parties (see 15 U.S.C. 45(m)(1)(B)).

Moreover, the principle upon which the court of appeals' decision rests is totally unworkable. A large number of adjudications, whether judicial or administrative, "change the law" in a significant way. And many agency adjudications, which typically involve the interpretation of broadly worded statutes of nationwide scope, have "widespread application" under familiar principles of stare decisis. Therefore, the decision below, if allowed to stand, will cast doubt upon the legality of a large number of administrative adjudications and will spawn numerous petitions for review invoking the essentially standardless rule upon which the court of appeals' decision in this case rests.[7]

Finally, the decision below cannot be supported on the ground that the use of adjudication in this case constituted an abuse of the Commission's discretion. The court did not find an abuse of discretion, and there is no support in the record for such a finding.

1. The decision of the court of appeals is squarely inconsistent with this Court's prior precendents. Without identifying any statutory provision preventing the Commission from employing adjudication to define unfair acts or

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[7] The general counsels of the Civil Aeronautics Board, Commodity Futures Trading Commission, Consumer Product Safety Commission, Federal Communications Commission, Federal Energy Regulatory Commission, Interstate Commerce Commission, National Labor Relations Board, Nuclear Regulatory Commission, and Securities and Exchange Commission have written to the Solicitor General to express their concern about the harmful implications of the court of appeals' decision in this case. This petition also serves as a brief amicus curiae on behalf of these agencies urging review of that decision.

practices [8], and without passing upon the merits of the Commission's decision, the court of appeals vacated the Commission's order because, in the court's view (App. A, *infra*, 5a), "the F.T.C. * * * exceeded its authority by proceeding to create new law by adjudication rather than by rulemaking." However, this Court's decisions in *Chenery II*, *Wyman-Gordon*, and *Bell Aerospace* leave no doubt that federal administrative agencies are "not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion" (*NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 294).

a. Chenery II, although not decided under the Administrative Procedure Act, 5 U.S.C. (& Supp. IV) 551 *et seq.*, is not only analogous to the present case, [9] but dispositive. *Chenery II* involved review of an order of the Securities Exchange Commission entered after the remand in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943) (*Chenery I*). In *Chenery I*, the Court set aside an SEC order refusing to approve a holding company's reorganization plan because the firm's officers and directors had traded in the company's securities during the reorganization period. The SEC had relied solely on prior judicial precedents, but this Court found that prior judicial decisions did not establish any principle of law or equity forbidding officers and directors of firms in reorganization from trading in their firm's stock (*id.* at 89-90). On remand, the

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[8] The Federal Trade Commission Act contemplates that the Commission will usually define unfair trade practices through adjudication (see pages 12-13, *infra*).

The Administrative Procedure Act, which defines the terms "rule" and "adjudication," 5 U.S.C. 551(4), (6), (7), and specifies appropriate procedures for both types of agency action (5 U.S.C. (& Supp. IV) 553, 554, 556 and 557), does not compel the use of either. See *NLRB* v. *Wyman-Gordon Co.*, *supra*, 394 U.S. at 771-772 (Black, J., concurring).

[9] See *NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 292 n.23.

SEC again reached the same result, but instead of supporting it by earlier judicial decisions, the agency relied upon a new administrative interpretation of the requirement in the Public Utility Holding Company Act that reorganization plans be "fair and equitable" (*Chenery II*, *supra*, 332 U.S. at 204). On review of this second order, the respondent corporation asserted—as did the court of appeals in this case (App. A, *infra*, 3a-5a)—that in the absence of prior judicial precedent the Commission could not in an adjudicatory proceeding determine for the first time that the challenged conduct was unfair and inequitable (see 332 U.S. at 199-200). Instead, the company maintained (*ibid.*), the agency was required to proceed by prospective rulemaking. This Court rejected that contention, holding that "[t]here is * * * a very definite place for the case-by-case evolution of statutory standards" and that the "choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency" (332 U.S. at 203).

b. NLRB v. *Wyman-Gordon Co.*, *supra*, reinforces this rule. There, the National Labor Relations Board directed an employer to furnish a list of its employees' names and addresses to two unions seeking to be chosen as the employees' bargaining representative (see 394 U.S. at 761). In issuing that order, the Board relied upon its prior decision in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), in which it had established a general requirement that such a list must be provided in future cases but declined to apply that requirement to the case before it.

The court of appeals held that the Board's order was invalid because it was based on a rule laid down in the *Excelsior* adjudication rather than in accordance with the rulemaking provisions of the Administrative Procedure Act. This Court reversed. In the plurality opinion joined by Chief Justice Warren and by Justices Stewart and White, Justice Fortas criticized the Board's use of adjudicatory proceedings to announce a rule of solely prospective application (394 U.S. at 765-766).

He stated:

> There is no question that, in an adjudicatory hearing, the Board could validly decide the issue whether the employer must furnish a list of employees to the union. But that is not what the Board did in *Excelsior*. The Board did not even apply the rule it made to the parties in the adjudicatory proceeding, the only entities that could properly be subject to the order in that case.

However, the plurality took pains to make clear that there is no impediment to agency adjudications that establish new precedent applicable to the parties in the case at hand (394 U.S. at 765-766; emphasis added):

> Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. * * * They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of *stare decisis* in the administrative process they may serve as precedents.

Thus, although the plurality believed that the *Excelsior* rule had been improperly adopted, it recognized that the same principle of law had been properly adopted in the adjudicatory proceeding then under review, because the decision in that proceeding bound the parties (*id.* at 766).

Concurring in the result, Justice Black, joined by Justices Brennan and Marshall, saw no defect in the procedure employed by the Board in the *Excelsior* case (394 U.S. at 770-775). Justice Black wrote (*id.* at 772):

> Our decision in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), though it did not involve the Labor Board or the Administrative Procedure Act, is nonetheless equally applicable here. As we explained in that case, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.*, at 203.

In the present case, the Commission's decision applied to Francis Ford, the only remaining party to the adjudication. Thus, that decision was entirely proper under both the plurality and concurring opinions in *Wyman-Gordon*.

c. This Court reconfirmed *Chenery II* and *Wyman-Gordon* in *Bell Aerospace Co.* At issue in that case was whether certain buyers were covered by the National Labor Relations Act. This Court agreed with the court of appeals that all employees properly classified as "managerial" were excluded from the Act's coverage (416 U.S. at 274-290). However, the Court unanimously rejected the lower court's holding that the Board was required to employ rulemaking rather than adjudication if on remand it wished to overrule its prior decisions holding that buyers are managerial employees (*id.* at 290-295 (majority and dissenting opinions)). The Court stated (*id.* at 294):

> The views expressed in *Chenery II* and *Wyman Gordon* make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.

The court of appeals' decision in this case—holding (App. A, *infra*, 3a) that "an agency *must* proceed by rulemaking if it seeks to change the law and establish rules of widespread application"—flies in the face of the unanimous views of this Court expressed in *Bell Aerospace*.

2. The court of appeals' decision also is inconsistent with the intent of Congress as manifested in the Federal Trade Commission Act, 15 U.S.C. (& Supp. IV) 41 *et seq.* Like the Labor Act in *Wyman-Gordon* and *Bell Aerospace* (see 416 U.S. at 291 n.21), the Federal Trade Commission Act does not specify that the agency must use rulemaking instead of adjudication to determine when practices violate statutory standards. On the contrary, Section 5(b) of the Act, 15 U.S.C. (& Supp. IV) 45(b), contemplates that the Commission will normally proceed by adjudication in determining what constitutes an "unfair or deceptive act or practice[]." Section 5(b) provides that "[w]henever the Commission shall have reason

to believe that any * * * corporation * * * is using any * * * unfair or deceptive act or practice [in respect to which a proceeding would be in the public interest], it shall issue and serve * * * a complaint stating its charges in that respect * * *." In granting this power, Congress intended that the Federal Trade Commission, the expert body in this field, would employ adjudicatory proceedings to develop a coherent and uniform body of precedent identifying unfair and deceptive trade practices and establishing appropriate remedies to be enforced by cease and desist orders. This task was to be conducted subject to review by the courts, which would have the ultimate responsibility for determining whether a practice was unlawful. See, *e.g.*, *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972); *FTC* v. *R.F. Keppel & Bros.*, 291 U.S. 304, 314 (1934). Although the Act also gave the Commission authority "to make rules and regulations for the purpose of carrying out [its] provisions" (15 U.S.C. 46(g)), the Commission's authority to define unfair acts or practices by rule was not confirmed until 1973. *National Petroleum Refiners Association* v. *FTC*, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974). A 1975 amendment to the FTC Act expressly conferred upon the Commission the authority to adopt rules defining unfair or deceptive acts or practices (15 U.S.C. (& Supp. IV 57a), but there is nothing to suggest that that amendment was intended to diminish the Commission's traditional discretion to proceed by adjudication in appropriate cases.

Indeed, another provision of the 1975 amendments is completely inconsistent with the court of appeals' holding (App. A, *infra*, 3a) that the Commission "must proceed by rulemaking if it seeks to change the law and establish rules of widespread application." 15 U.S.C. 45(m)(1)(B) provides that when the Commission enters an order adjudicating a particular practice to be unfair or deceptive, it may obtain civil penalties from businesses not parties to the original adjudication if they later commit the same unfair or deceptive practices with actual

knowledge of the Commission's holding.[10] Thus, the orders to which this provision applies are orders entered in adjudicatory proceedings, which generally define new unfair or deceptive practices, and which may be binding upon businesses that are not parties to the adjudication. By enacting this provision, Congress plainly rejected the rationale of the court of appeals in the present case.

In accordance with the clear intent of the Federal Trade Commission Act, this Court has stated that the Commission may hold in an adjudication that a "practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes" (*FTC* v. *Sperry & Hutchinson Co.*, *supra*, 405 U.S. at 244 n.5). Here, the Commission properly found that Francis Ford's practices offended public policy as established by the Uniform Commercial Code and numerous cases thereunder. Moreover, as *Sperry & Hutchinson Co.* makes clear, the lack of prior judicial decisions holding such practices unlawful would not prevent the Commission from acting.

3. Not only is the decision below inconsistent with this Court's prior decisions and provisions of the FTC Act, but it is utterly devoid of precedential support. The court of appeals relied upon only two authorities (App. A, *infra*, 3a): its previous decision in *Patel* v. *INS*, 638 F.2d 1199 (9th Cir. 1980), and Professor Kenneth Culp Davis' treatise on administrative law (2 *Administrative Law Treatise* § 7:25, at 124 (1979)).

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[10] In 15 U.S.C. 45(m)(1)(A), Congress provided separately for civil penalty actions against those who violate rules respecting unfair or deceptive acts or practices, if they have actual knowledge or "knowledge fairly implied" that the practice is unfair or deceptive and is prohibited by rule. The rules that form the basis for such actions must be promulgated in accordance with Section 18 of the Act, 15 U.S.C. (& Supp. IV) 57a, which requires compliance with the rulemaking procedures in the Administrative Procedure Act, 5 U.S.C. (& Supp. IV) 553, as well as certain additional procedures.

Upon examination, however, it is clear that neither authority supports the court's decision.

In *Patel*, the Board of Immigration Appeals held that aliens were ineligible to remain in this country even though they had satisfied the express provisions of the so-called "investor exemption" contained in 8 C.F.R. 212.8(b)(4). The Board based its decision upon a previous adjudication that purported to add a requirement to that exemption (see 638 F.2d at 1202). Prior to the adjudication announcing the new requirement, the same requirement had been included in a proposed amendment to the rule but had been withdrawn after notice and comment *(ibid.)*.

The court of appeals held on two alternative grounds that the aliens were eligible for the "investor exemption." First, the court concluded that the new requirement should have been adopted by rulemaking rather than adjudication (638 F.2d at 1203-1205). Second, the court held that the Board abused its discretion in applying the new requirement in the case at hand because "INS had been sending aliens confusing signals" (*id.* at 1205).

Patel provides no support for the decision in this case. Only the first alternative ground for decision in *Patel* could conceivably support the decision below, and that ground was apparently abandoned in a subsequent decision by the same court (*Bahat* v. *Sureck*, 637 F.2d 1315 (9th Cir. 1981)). Moreover, *Patel* involved an adjudication that was seemingly inconsistent with the regulation then in effect and that adopted a rule that the agency had recently decided not to issue after notice and comment. The circumstances in the present case are not even faintly analogous.[11]

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[11] In addition, the first alternative holding in *Patel* was based primarily upon *Chenery II*, *Wyman-Gordon*, and *Bell Aerospace* (see 638 F.2d at 1203-1205). Thus, if *Patel* embraced the rule that an agency must proceed by rulemaking when announcing a new statutory interpretation of widespread application, it was based upon a patent misreading of those decisions (see pages 8-12, *supra*).

The only other authority cited by the court of appeals was Professor Davis' treatise, but Professor Davis has specifically disavowed the court's reliance upon his book (*1982 Supplement to Administrative Law Treatise* § 7.25, at 182-183).[12]

4. The rule announced in the court of appeals' decision—that "an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application"—is not only incorrect; it is unworkable. There is no bright line between adjudications that "change the law" and those that do not.[13] Similarly, there is no clear distinction between decisions with "widespread application" and those with a narrower reach. The court of appeals did not attempt to define the term "widespread application," and it is doubtful that a satisfactory definition could be developed. Any decision rendered in an adjudicatory proceeding may have precedential value, and the future significance of a decision is frequently

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[12] Professor Davis wrote (*1982 Supplement to Administrative Law Treatise, supra*, § 7.25, at 182-183):

> The Treatise strongly favors rulemaking over adjudication, but the court in the Ford opinion should not have imputed to it the view that "courts should require agencies to use rulemaking procedures when the agency adopts new law * * *." The page the court cited (§ 7.25 at 124) was on the subject of "a rule announced in an adjudicatory opinion, *not applied in the particular case*, changing a former rule," and the court ignored the words here italicized. The following page says that "the courts obviously should allow the Board to evolve labor law through adjudication * * *."

He added (*id.* at 181-182) that the court of appeals' holding was

> truly spectacular because (a) no previous law supports it, (b) both courts and agencies have at all stages of their development changed law through adjudication even when such law is of widespread application, and (c) the proposition is directly contrary to two prominent Supreme Court holdings [*i.e.*, *Chenery II* and *Bell Aerospace*].

[13] In this case, for example, the Commission simply applied existing U.C.C. precedent to a set of facts that had not been presented to any court in the identical form.

unclear until long after it is handed down. Accordingly, the rule announced by the court of appeals' decision would cast doubt upon the validity of a very large number of agency adjudications. It would provide a basis for challenging most adjudications and would spawn numerous petitions for review in which the courts would be called upon to decide whether a particular adjudication created "new law" and whether it had "widespread application."

5. While this Court has held that the choice between adjudication and rulemaking is committed to an agency's sound discretion, it has recognized that "there may be situations where the [agency's] reliance on adjudication would amount to an abuse of discretion" (*NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 294). In this case, however, the court of appeals did not find that the Commission abused its discretion but rather that it "exceeded its authority" (App. A, *infra*, 5a). Moreover, even assuming, despite the language of the decision, that the court of appeals found an abuse of the Commission's discretion rather than action in excess of statutory authority, the court's decision is nevertheless irreconcilable with the decisions of this Court discussed above.

The court of appeals gave great weight to its belief that the Commission's construction of the U.C.C. was unprecedented and to the lack of prior notice of the Commission's interpretation (App. A, *infra*, 4a). But *Chenery II*, *Wyman-Gordon*, and *Bell Aerospace* all involved adjudications interpreting the law in a new way, and in none of those cases was prior notice of the new interpretation given to the parties. Yet all of those decisions found no abuse of agency discretion. Indeed, in *Chenery II*, *supra*, 332 U.S. at 203, the Court expressly "refuse[d] to say that the Commission, which had not previously been confronted with the problem * * *, was forbidden from utilizing

[the adjudicatory] proceeding for announcing and applying a new standard of conduct."[14]

The court of appeals stated that the Commission's pending rulemaking proceeding concerning credit practices sought "to remedy, more or less, the same credit practices" involved in this case (App. A, *infra*, 4a). In fact, however, the proposed rule does not address the disposition of surpluses resulting from the sale of repossessed collateral, and the notice of it did not invite comment on that subject (see 40 Fed. Reg. 16347 (1975)). To be sure, the court of appeals correctly observed that the Commission "could have formulated its position on U.C.C. § 9-504" through rulemaking (App. A, *infra*, 4a). But the same was true in *Chenery II*, *Wyman-Gordon*, and *Bell Aerospace*. All those cases involved situations in which the

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[14] The misleading statements in the court of appeals' opinion led Professor Davis to suggest that the result in this case (although not the court's rationale) might be justified (*1982 Supplement to Administrative Law Treatise*, *supra*, § 7:25 at 183). He wrote (*ibid.*; emphasis in original) "[t]he support for the Ford decision lies in *the combination of* (a) the general superiority of rulemaking over adjudication for making new law, (b) the strong fact that the question whether to adopt the new law was simultaneously under consideration in a pending rulemaking proceeding, and (c) the palpable unfairness of singling out the one dealer for prosecution and denying intervention to the association representing 3,500 dealers." As noted, however, (see page 18 & note 15, *infra*) the proposed rule does not address the question involved in this case, and the association's request to intervene was granted in part with leave to renew the remainder of its application. Furthermore, Francis Ford was not unfairly singled out for special treatment. At present, the sole effect of the Commission's order upon Francis Ford is to require cessation of the practice adjudged unlawful. Under 15 U.S.C. 45(m)(1)(B), a similar obligation is imposed upon any other dealer with actual knowledge of the Commission's holding.

agency had a choice between rulemaking and adjudication (see 416 U.S. at 294; 394 U.S. at 765-766, 772; 332 U.S. at 203).[15]

Moreover, this case, like *Bell Aerospace*, "is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on [Commission] pronouncements. Nor are fines or damages involved here" (416 U.S. at 295). The Commission's holding did not reverse any prior agency precedents on which respondent might have relied, and the only consequence of the order under review is prospective: Francis Ford must cease withholding surpluses in the future, like the other parties named as respondents in the Commission's complaints.

While the Commission expressly warned that after judicial review it might seek consumer redress under Section 19(a)(2) of the Act, 15 U.S.C. 57b(a)(2), it did not decide that question (App. D, *infra*, 36a) and that issue was not before the court of appeals. Moreover, the standards of Section 19(a)(2) and (b), 15 U.S.C. 57b(a)(2) and (b), ensure that a retroactive remedy for consumer injury will not be imposed on Francis Ford unless

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[15] The court of appeals found it significant that the Commission "appended a 'Synopsis of Determination' to the order, apparently for the purpose of advising other automobile dealerships of the results of this adjudication" (App. A *infra*, 5a). But such synopses, which are issued to simplify notice under 15 U.S.C. 45m(1)(B), add no more to the Commission's opinion than do the syllabi accompanying this Court's decisions.

The court of appeals stated that the Commission denied the National Association of Car Dealers' request to intervene (App. A, *infra*, 2a). However, the Association was permitted to intervene on the issue of remedy, and the Commission stated that it would be "favorably disposed" toward a renewed application for intervention on the issue of liability if it appeared that the relevant issues would not be adequately presented by the parties (see App. D, *infra*, 35a n.16). No such renewed application was made and the Association chose not to appear at all in the administrative proceeding even as amicus curiae (*ibid.*).

the courts find that remedy to be equitable under the circumstances. Such redress may be awarded only if the Commission proves that a reasonable man would have known under the circumstances that the practices in question were fraudulent or dishonest. 15 U.S.C. 57b(a)(2).

Even if the Commission's determination in this case had immediate retroactive effects, those effects would not render its use of adjudication an abuse of discretion. Adverse consequences that substantially outweigh the public interest involved would have to be shown. See *Bell Aerospace Co.*, *supra*, 416 U.S. at 295. As *Chenery II* explained (332 U.S. at 203):

> Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

The conduct found unlawful by the Commission in this case—systematic retention by a creditor of surpluses earned on sale of a debtor's collateral, in violation of the U.C.C.—involves a serious departure from fair credit practice that outweighs any ill effects of retroactive application.

Finally, the court of appeals disregarded one of the Commission's principal reasons for choosing adjudication instead of rulemaking (App. D, *infra*, 31a-32a). Only adjudication would permit the Commission to accomplish the dual statutory objectives of (1) defining and promptly halting the unfair practice and (2) establishing the possibility of redress for consumers previously injured by the condemned practices (if the requisite showing can be made). The consumer redress for rule violations is available only after issuance of the rule. See page 3, *supra*. It cannot be an abuse of discretion for an agency to select adjudication rather than rulemaking when that choice is necessary for the agency to discharge its statutory mandate.

CONCLUSION

The petition for a writ of certiorari should be granted.[16]
Respectfully submitted.

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JULY 1982

[16] The Court may wish to consider summary disposition.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 79-7647, 79-7654

FORD MOTOR COMPANY, FORD MOTOR CREDIT CO. and FRANCIS FORD, INC.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Argued and Submitted May 5, 1981
Decided Aug. 24, 1981

Petition for Review of the Order of the Federal Trade Commission.

Before GOODWIN, KENNEDY, and ALARCON, Circuit Judges.

GOODWIN, Circuit Judge.

Francis Ford, Inc. petitions this court to review an F.T.C. order finding it in violation of § 5 of the F.T.C. Act, 15 U.S.C. § 45 (unfair trade practices). We have reviewed the petition, and set aside the order.

Francis Ford, Inc. is an Oregon automobile dealership. Its practice in repossessing cars has been to credit the debtor for the wholesale value of the car, charge him for indirect expenses (*i.e.*, overhead and lost profits) as well as direct expenses (*i.e.*, refurbishing) associated with repossession and resale, and sell the repossessed vehicle at retail keeping the "surplus." In doing so, Francis Ford claims it is doing what is commonly done throughout its industry.

The F.T.C. does not approve of the described practice. Nor does it approve of a number of other credit practices now commonly in use in a wide variety of industries. See its investigations of the credit business, and its recent attempted rulemaking. *In re Proposed Trade Regulation Rule:* Credit Practices, 40 Fed. Reg. 16,347 (1975).

In order to attack Francis Ford's practice, the F.T.C. began in 1976 an adjudicatory action against Ford Motor Co., Ford Credit Co., and Francis Ford, Inc. The commission alleged that the respondents had violated § 5 of the F.T.C. Act by failing to give defaulting customers more than wholesale value for their repossessed cars, and by improperly charging them with indirect expenses such as overhead and lost profits. Parallel proceedings were commenced against Chrysler Corp. and General Motors, their finance subsidiaries, and two dealers. The National Association of Car Dealers sought to intervene to protect the interests of its members but was not allowed to do so. Eventually, all the respondents except Francis Ford settled with the F.T.C.

Shortly after the consent decrees were entered, the administrative law judge held that Francis Ford's credit practices had violated § 5 of the F.T.C. Act, but that the commission had failed to establish that Francis Ford's acts were substantially injurious to its customers. Both Francis Ford and complaint counsel for the F.T.C. appealed to the full commission. The commission deleted the portion of the order favorable to Francis Ford, and affirmed the administrative law judge's decision. The order directed Francis Ford to cease its present credit practices, and to adopt the F.T.C.'s view of proper credit practices under ORS 79.5040 (U.C.C. § 9-504).

The narrow issue presented here is whether the F.T.C. should have proceeded by rulemaking in this case rather than by adjudication. The Supreme Court has said that an administrative agency, such as the F.T.C., "is not precluded from announcing new principles in the adjudicative proceeding and that the choice between rulemaking and adjudication lies in the

first instance within the [agency's] discretion." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294, 94 S.Ct. 1757, 1771, 40 L.Ed.2d 134 (1974). *See also, Securities Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 202-203, 67 S.Ct. 1575, 1580-81, 91 L.Ed. 1995 (1947). But like all grants of discretion, "there may be situations where the [agency's] reliance on adjudication would amount to an abuse of discretion . . ." *Bell Aerospace Co.*, 416 U.S. at 294, 94 S.Ct. at 1771. The problem is one of drawing the line. On that score the Supreme Court has avoided black-letter rules. *See id.* at 294, 94 S.Ct. at 1772 ("[i]t is doubtful whether any generalized standard could be framed which would have more than marginal utility. . . .") Lower courts have been left, therefore, with the task of dealing with the problem on a case-by-case basis.

The Ninth Circuit recently made such an attempt in *Patel* v. *Immigration & Naturalization Serv.*, 638 F.2d 1199 (9th Cir. 1980). In *Patel*, the Immigration and Naturalization Service, by an administrative adjudication, added a requirement to a regulation governing permanent immigration to this country. The court disallowed the requirement because the requirement changed past practices through the "prospective pronouncement of a broad, generally applicable requirement, amount[ing] to 'an agency statement of general or particular applicability and future effect.' " *Id.* at 1204, n.5. In the court's view, the rule of law should have been established by rulemaking because, unlike *Bell Aerospace*, *supra*, the case before it called for a general standard, not a case-by-case determination. *Id.* at 1205. *Patel* cited Professor Davis for the view that courts should require agencies to use rulemaking procedures when the agency retroactively adopts new law or where the parties have relied on the precedents. 2 Davis, *Administrative Law Treatise*, § 7:25 at 124 (1979). The thrust of the *Patel* holding, therefore, is that agencies can proceed by adjudication to enforce discrete violations of *existing* laws where the effective scope of the rule's impact will be relatively small; but an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application.

In the present case, the F.T.C., by its order, has established a rule that would require a secured creditor to credit the debtor with the "best possible" value of the repossessed vehicle, and forbid the creditor from charging the debtor with overhead and lost profits. The administrative decision below so holds. Framed according to *Patel*, the precise issue therefore is whether this adjudication changes existing law, and has widespread application. It does, and the matter should be addressed by rulemaking.

The F.T.C. admits that industry practice has been to do what Francis Ford does—credit the debtor with the wholesale value and charge the debtor for indirect expenses. But the F.T.C. contends that Francis Ford's particular practice violates state law (ORS 79.5040); that the violation will not be reached by the proposed trade rule on credit practices; and that this adjudication will have only local application. The arguments are not persuasive.

By all accounts this adjudication is the first agency action against a dealer for violating ORS 79.5040 by doing what Francis Ford does. Although the U.C.C. counterpart of ORS 79.5040 is enacted in 49 states, nearly word for word, we have been cited to no case which has interpreted the provision to require a secured creditor to credit the debtor for the "best possible price" and not charge him for overhead and lost profits. It may well be that Oregon courts will interpret U.C.C. § 9-504 in the manner advocated by the F.T.C. if the question is put to them. But it is speculation to contend, as does the F.T.C. here, that Francis Ford is in violation of *existing* Oregon law. One of the basic characteristics of law is that potential violators have, or can obtain, notice of it. No notice of the F.T.C.'s view of the law has been pointed out to us.

The F.T.C. could have formulated its position on U.C.C. § 9-504 and its application to the credit practices of car dealerships in its proposed trade rule on credit practices. It did not do so. The pending rulemaking proceeding and this adjudication seek to remedy, more or less, the same credit practices. Although the former is directed against the practices, *inter alia*, of car dealers in their accounting of deficiencies, and the

latter is directed against a car dealer by reason of his practices in failing to account for surpluses, both matters are covered by U.C.C. § 9-504. If the rule for deficiencies is thought by the F.T.C. to be "appropriately addressed by rulemaking," it should also address the problem of accounting for surpluses by a rulemaking proceeding, and not by adjudication.

Ultimately, however, we are persuaded to set aside this order because the rule of the case made below will have general application. It will not apply just to Francis Ford. Credit practices similar to those of Francis Ford are widespread in the car dealership industry; and the U.C.C. section the F.T.C. wishes us to interpret exists in 49 states. The F.T.C. is aware of this. It has already appended a "Synopsis of Determination" to the order, apparently for the purpose of advising other automobile dealerships of the results of this adjudication. To allow the order to stand as presently written would do far more than remedy a discrete violation of a singular Oregon law as the F.T.C. contends; it would create a national interpretation of U.C.C. § 9-504 and in effect enact the precise rule the F.T.C. has proposed, but not yet promulgated.

Under these circumstances, the F.T.C. has exceeded its authority by proceeding to create new law by adjudication rather than by rulemaking.

The order is vacated.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 79-7647, 79-7654

JUDGMENT FTC No. 9073

FORD MOTOR COMPANY, FORD MOTOR CREDIT CO. and FRANCIS FORD, INC.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Filed and entered August 24, 1981.

Upon Petition to Review a Decision of The FEDERAL TRADE COMMISSION.

This Cause came to be heard on the Transcript of the Record from The FEDERAL TRADE COMMISSION and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said FEDERAL TRADE COMMISSION in this cause be and hereby is vacated.

A true copy. Attest May 4, 1982. PHILLIP B. WINBERRY, Clerk of Court. by: Deputy Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 79-7647, 79-7654

ORDER

FORD MOTOR COMPANY, FORD MOTOR CREDIT COMPANY and FRANCIS FORD, INC.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Filed April 5, 1982.
PHILLIP B. WINBERRY,
CLERK, U.S. COURT OF APPEALS.

Before: GOODWIN, KENNEDY and ALARCON

The panel voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court having been advised of the suggestion for an en banc rehearing, a judge in active service requested that a vote be taken on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). Upon the vote of the eligible judges in active service, a majority voted against en banc rehearing.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 79-7647, 79-7654

OPINION

FORD MOTOR COMPANY, FORD MOTOR CREDIT CO. and FRANCIS FORD, INC.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Filed April 5, 1982.
PHILLIP B. WINBERRY,
CLERK, U.S. COURT OF APPEALS.

Petition for Review of the Order of the Federal Trade Commission

Argued and Submitted May 5, 1981
Decided August 24, 1981

Before GOODWIN, KENNEDY, and ALARCON, Circuit Judges.

REINHARDT, Circuit Judge, dissenting from denial of rehearing en banc:

I dissent from the court's refusal to rehear this case en banc. I believe the opinion creates unnecessary and undesirable confusion as to the state of the law in our circuit, and that the standard we appear to announce conflicts with the general principles of administrative law, previously enunciated by the Supreme Court, which will remain applicable in the rest of the nation. Unless the Supreme Court grants certiorari, and applies a different standard than we appear to be adopting,

government agencies will be required to ask us on a case by case basis to limit, narrow, and explain away the overly broad rationale set forth in the opinion.

I believe that our circuit would be better served if we did the necessary job ourselves. I think that it is *our* function to correct our errors in cases of general importance, especially when our decision conflicts with earlier binding precedent in our circuit and when we have failed to distinguish, or even discuss, that applicable precedent. The best way to do this is through our en banc process.

The panel explains its decision by stating "[u]ltimately, however, we are persuaded to set aside this order because the rule of the case made below will have general application. It will not apply just to Francis Ford." *Supra*, at 4252. This statement simply cannot be reconciled with our recent decision in *NLRB* v. *St. Francis Hospital of Lynwood*, 601 F.2d 404 (9th Cir. 1979), which remains the law in this circuit. There we said:

> The Hospital initially argues that the holding of the *Mercy* decision, because it is to be generally applied, was tantamount to a rule. The Hospital further contends that, because of the Board's failure to follow the procedures for agency rulemaking, as delineated in 5 U.S.C. § 553, the rule is unenforceable. Contrary to the Hospital's argument, it has been consistently held that "the Board is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rulemaking and adjudication lies in the first instance within the Board's discretion. Thus, the mere fact that the Board created a binding policy by adjudication does not affect the policy's validity especially where it covers an area in which the Board is permitted to act pursuant to its discretion.

601 F.2d at 414 (citations omitted).

Nor can the panel's explanation of its decision be reconciled with *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), *NLRB* v. *Wyman-Gordon*, 394 U.S. 759 (1969), or *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. 194 (1947). Those cases make it clear that administrative agencies *are* authorized to engage in decision making which results in standards to be applied in all

future cases. The panel's statement that rulemaking is required because the decision would have "general application," and because it will have an effect in the long run on persons other than the individual whose case was before the agency, constitutes an unwarranted and unique acceptance of the "perennial plaint" that decisions of administrative agencies should be invalidated because of their "general" impact. *See British Caledonian Airways, Ltd.* v. *CAB*, 584 F.2d 982, 992 (D.C. Cir. 1978).

The panel's opinion pays lip service at most to the basic principle of administrative law that "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *NLRB* v. *Children's Baptist Home*, 576 F.2d 256 (9th Cir. 1978). While repeating the rule, the panel opinion gives it no weight and no significance; and the panel fails to state explicitly that the agency abused its discretion.

The panel cites only one of our prior decisions, *Patel* v. *I&NS*, 638 F.2d 1199 (9th Cir. 1980). In *Patel*, we refused to permit the Immigration and Naturalization Service to use an earlier adjudication to create or impose a job creation requirement on an alien seeking the investor exemption from labor certification requirements. The holding in *Patel* turned on two factors: (1) the I&NS's "confusion" regarding the job creation requirement, *id.* at 1205; *cf. Runagswang* v. *I&NS*, 591 F.2d 39, 46 (9th Cir. 1978) (Sneed, J., concurring); and (2) "the resulting hardship to Patel. . . ." *Patel*, 638 F.2d at 1205. Neither of those factors is present here and the holding in *Patel* does not support the panel's analysis.

Since the call for an en banc vote failed to muster the support of an absolute majority of the active members of this court who were eligible to vote, [1] it would appear that a number of my

[1] Under our limited en banc rule, a call for an en banc vote prevails only when affirmative votes are cast by a majority of the 23 active members of the court who are not disqualified from voting. We then form a limited en banc panel of 11 judges, comprised of 10 judges drawn at random and the Chief Judge. When we deny an en banc request, after a vote is called for, we do not announce the number of

colleagues are not as concerned as I am with the conflict between the broad, generalized statement in the panel's opinion and our own prior precedents which carefully apply the applicable line of Supreme Court cases in this area. My colleagues may believe that the broad, generalized statement is limited by the specific explanations subsequently offered in the panel's opinion. Specifically, they may feel that the opinion stands only for the proposition that an administrative agency decision which creates a new and different national interpretation of the uniform law (in this case the Uniform Commercial Code) applicable in all of the states of this nation is beyond an agency's decision making powers, at least where the agency has proposed a rule which would have that effect but has not yet enacted it. [2] If this is my colleague's view, the damage caused by the panel's opinion will be minor and temporary. I think we would be better served, however, if we would clarify the law of the circuit now, through the en banc procedure, rather than allow the unnecessary confusion which will inevitably exist in the field of administrative law pending the time that we explain the limitations of the majority's opinion in our subsequent decisions.

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judges who voted to grant the request. All that we reveal by our announcement that an unsuccessful vote was taken is the fact that fewer than 12 active judges voted to hear the case en banc. The reference in the text to the requirement of an absolute majority therefore does not constitute any indication as to the number of judges supporting the request in this case or any indication as to how the court divided. To the contrary, it is merely a reflection of the rule we follow in all cases.

[2] In *Patel*, while our holding was limited to the factors described in the text, *supra*, we also concluded that the so-called *Heitland* rule established in an adjudicatory proceeding was an "improper circumvention of rule-making procedure." We stated:

> Only months before, the INS itself had recognized the desirability of establishing a job-creation standard by rulemaking when it proposed the 1973 regulation. *See* 37 Fed. Reg. 23274 (1972); 38 Fed. Reg. 1379 (1973). The INS eventually failed to include the job-creation standard in its rule. Under the authority of

The en banc procedure provides us with a valuable tool. It allows us to function efficiently, to resolve intracircuit conflicts and to ensure that cases of major importance are decided in a manner which reflects the law as we see it as a circuit, and as we will apply it in the long run. When we fail to take advantage of that tool, we create unnecessary work for the Supreme Court, and for ourselves if the Supreme Court fails to act. I regret that we did not take the opportunity to clarify the law in the case before us. I am confident that had we done so we would have expressed the applicable principles of administrative law in a different and more traditional manner than the panel does here.

Wyman-Gordon, we conclude that if the INS wished to add the job-creation criterion, it should have done so in a rulemaking procedure.

Patel v. *INS*, 638 F.2d 1199, 1204 (9th Cir. 1980).

Here, the agency had proposed the adoption of the standard as part of a regulation it was considering, but adopted the standard in an adjudicatory proceeding before the rule-making process was completed. Thus, my colleagues may believe that, as in *Patel*, the agency circumvented the rule-making process and that, notwithstanding the panel's broad general statements, the panel opinion will be so limited if we are asked to consider it in future cases.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9073

In the matter of

FORD MOTOR COMPANY,
FORD MOTOR CREDIT COMPANY,
and FRANCIS FORD, INC.,
corporations.

COMMISSIONERS:

MICHAEL PERTSCHUK, Chairman
PAUL RAND DIXON
DAVID A. CLANTON
ROBERT PITOFSKY

OPINION OF THE COMMISSION

By Dixon, Commissioner

This case involves the alleged failure of a large Portland, Oregon automobile dealer to refund to its customers surpluses resulting from the repossession and resale of those customers' cars. The complaint was issued on February 10, 1976, and charged Ford Motor Company, Ford Motor Credit Company, and Francis Ford, Inc. with violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) by virtue of alleged failures to refund surpluses. On March 17, 1978, the case was withdrawn from adjudication with respect to Ford Motor Company and Ford Motor Credit Company, which had signed consent agreements (subsequently accepted and made final by the Commission) in disposition of the charges of the complaint. Proceedings as to the remaining respondent, Francis Ford, continued with hearings before Administrative Law Judge (ALJ) Lewis Parker. He entered an initial decision on January

4, 1979, that largely sustained the complaint, although not entirely to the satisfaction of complaint counsel who, along with respondent Francis Ford, have brought this matter to the Commission on cross appeals.

Judge Parker's decision deals ably (and, for the most part, we have concluded, correctly) with the issues raised by both sides, but, this being in some respects a case of first impression, with possibly significant ramifications for others besides the litigants, we shall retrace a few of his steps. The parties appear to have no serious differences with respect to the facts of this matter; their dispute is principally over the legal and alleged "policy" determinations that should govern the decision.

A. Background

Francis Ford is one of the two highest-volume Ford dealers in the Portland, Oregon, area (Tr. 157), [1] with sales of roughly 2400 vehicles per year, and revenues in excess of $13 million during each of the two years preceding issuance of the complaint. (I.D. 1) About 70 percent of Francis Ford's retail sales of motor vehicles are financed in whole or in part, either through Ford Motor Credit Co. or the United States National Bank of Oregon. (I.D. 18)

When a customer purchases a car on credit, he or she will typically execute an installment contract that calls for monthly installment payments and grants a security interest in the automobile as protection against nonpayment. (I.D. 19) The contract is then assigned by Francis Ford to the lending institution. By agreement with both Ford Motor Credit Co. and

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[1] The following abbreviations will be used in this opinion:

I.D. - Initial Decision, Finding No.
I.D.p. - Initial Decision, Page No.
Tr. - Transcript of Testimony, Page No.
CX - Complaint Counsel's Exhibit No.
RX - Respondent's Exhibit No.

U.S. National Bank of Oregon, each retail installment contract assigned to these institutions is deemed to be assigned on a "repurchase" basis unless otherwise specified. (I.D. 25-26) Under its repurchase agreements, Francis Ford is obliged, in the event that a customer defaults and the lender repossesses the car, to pay to the lender the outstanding balance on the loan, in return for which Francis Ford receives back the repossessed car.

B. The General Duties Of A Second Party With Respect To Repossessed Collateral

The duties of Francis Ford with respect to repossessed collateral are governed by the Uniform Commercial Code, which has been adopted in Oregon, Oregon Revised Statutes (ORS) §§ 71.1010-79.5070. [2] The form contracts executed by Francis Ford impose upon it the same obligations. (I.D. 20-21) As the recipient of the collateral from the finance company, Francis Ford has all the rights and the duties of the secured party:

> "*A person who is liable to a secured party under a* guaranty, indorsement, *repurchase agreement or the like and who receives a transfer of collateral from the secured party* or is subrogated to his rights *has thereafter the rights and duties of the secured party*. Such a transfer of collateral is not a sale or disposition of the collateral under this article." UCC § 9-504(5); ORS § 79.5040(5), emphasis added.

See also Reeves v. *Associates Financial Services Co.*, 197 Neb. 107, 247 N.W.2d 434, 439 (1976).

A principal duty of a secured party, and the one at issue here, is the obligation to account to the debtor for any surplus realized on the repossessed collateral:

> "If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus,

[2] The UCC is also law in 48 other states and the District of Columbia. In Louisiana, repossessions and resales of collateral are judicially supervised.

and, unless otherwise agreed, the debtor is liable for any deficiency. . . ." UCC § 9-504(2); ORS § 79.5040(2).

Francis Ford does not dispute its general obligation to pay surpluses under applicable state law, but it quarrels with complaint counsel's and Judge Parker's characterization of the manner in which the existence of a surplus is to be determined.

C. Computation of Surpluses: Complaint Counsel's Position

In the view of complaint counsel and Judge Parker, the existence of a surplus is to be determined by comparing (1) the proceeds realized from a "commercially reasonable" sale of the repossessed collateral [UCC § 9-504(3); ORS § 79.5040(3)] with (2) the indebtedness secured by the security interest plus (3) "the reasonable expenses of retaking, holding, preparing for sale, selling, and the like. . . ." [UCC § 9-504(1); ORS § 9.5040(1)]. [3]

In conducting a commercially reasonable sale of the collateral, the secured party acts as a trustee or fiduciary of the debtor and is obliged to seek the best possible price. *United States* v. *Terrey*, 554 F.2d 685, 693 (1977); *Dopp* v. *Franklin Nat'l Bank*, 374 F. Supp. 904, 910 (S.D.N.Y. 1974); *Vic Hansen & Sons, Inc.* v. *Crowley*, 57 Wis. 106, 203 N.W.2d 728, 731 (1973). *See also* discussion of authorities at I.D. pp. 33-35. "Reasonable expenses" in complaint counsel's and Judge Parker's view include only the direct, out-of-pocket expenses of the secured party, and thus exclude general allowances for dealer overhead or profit on resale of the repossessed item.

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[3] Where applicable, the law also allows the secured party to deduct from the proceeds of resale when determining the existence of a surplus or deficiency "the reasonable attorneys' fees and legal expenses incurred by the secured party" but only "to the extent provided for in the agreement and not prohibited by law." [UCC § 9-504(1); ORS § 79.5040(1)]. Before payment of a surplus, the UCC also provides for satisfaction of any "subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed." [§ 9-504(1)(c); ORS § 79.5040(1)(c)]

Where the proceeds of the resale exceed the sum of the consumer's indebtedness plus the reasonable expenses incident to the resale, a surplus exists. Applying this formula, Judge Parker found that during the period of 1974-75 Francis Ford realized at least 43 surpluses, of which only one was paid in full and five in part, leaving in excess of $15,000 withheld from consumers entitled to refunds. (I.D. 85-86) [4]

D. Computation Of Surpluses: Francis Ford's Practice

Having carefully reviewed the testimony of all witnesses in this case, it remains somewhat unclear to us precisely how (or whether) Francis Ford attempted to determine the possible existence of surpluses when it obtained repossessed automobiles. It seems clear that no effort was routinely made to

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[4] At trial, complaint counsel introduced compilations of alleged surpluses based upon records reflecting resale prices of repossessed automobiles, the indebtedness of the consumers involved, and the direct out-of-pocket expenses incurred by Francis Ford in preparing the automobiles for resale. Francis Ford introduced evidence to show that in some respects complaint counsel's compilations understated the magnitude of direct out-of-pocket expenses, and complaint counsel, accordingly, corrected their compilations to take account of this testimony. The ALJ found in his initial decision that these corrected compilations presented by complaint counsel reflected the extent of surpluses realized by Francis Ford, based on the legal formula for computing surpluses urged by complaint counsel. (I.D. 83-85) Francis Ford argues in its appeal brief, p. 46, that at least 17 of these compilations omit expenses proven at trial, and that three other cars (plus one of the 17) should have been excluded because they were demonstrator units sold to Francis Ford salesmen. With respect to the 17 compilations, each of them does include some allowance for costs of repairs and reconditioning. Respondent presumably claims that allowance was not made for all such costs, but respondent has given no citations whatsoever to record evidence that would allow this claim to be verified, and it, therefore, must be rejected. With respect to the demonstrator units, we agree with complaint counsel that their purchasers should be treated no differently from any others.

compare the proceeds of an actual resale of the collateral with the debtor's indebtedness and expenses incident to the resale, however they might be calculated. (I.D. 51) [5]

Two other possibilities as to how Francis Ford dealt with its legal obligations under the UCC prior to the trial in this case are suggested by the record. Some of the testimony indicates that Francis simply regarded its own repurchase of a repossessed car from the finance company as constituting a proper UCC sale for purposes of determining the proceeds. By definition, this method would always result in the "proceeds" equalling or falling short of the indebtedness, since the price at which Francis Ford repurchased from the finance company would be essentially the amount owed by the defaulting consumer to the finance company. [6] Thereafter, Francis Ford would regard the

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[5] Francis Ford contends that "reasonable expenses of retaking" should include dealer's overhead, an issue we shall discuss later. As a Francis official noted, however, "We have no document that shows all of the proceeds of the sale to all of the expenses." (Tr. 930) After being contacted by representatives of the Federal Trade Commission, Francis Ford did prepare an after-the-fact accounting of the proceeds and expenses of repossession sales for the three month period of October 1 to December 31, 1974. (CX 2344) Even after adding substantial allowances for overhead items including lot maintenance, phone, water, lights, rent, and advertising that did not mention the repossessed vehicle, Francis' tabulations revealed the occurrence of several surpluses, which it paid in July, 1975. (I.D. 52, Tr. 221-24) Thereafter, Francis resumed its practice of making no comparison of repossession costs and proceeds, and its practice of paying no surpluses.

[6] The amount paid by Francis Ford to the finance company to repurchase a repossessed automobile is called the "payoff". (I.D. 37-38) The payoff does not usually equal the amount owed by the consumer on his or her installment contract at the time of repossession. When a repossession occurs, the finance company will credit the consumer for any prepaid but unearned finance charges or insurance premiums. Similarly, the finance company will charge the consumer for any costs incident to effecting the repossession, such as towing. This establishes the consumer's total indebtedness. Francis Ford is

repossessed vehicle as its own, and any resale would be treated as would the resale of any used car. Thus, a company official testified:

> ". . . the sale occurs at the time Ford Motor Credit sends the vehicle back to Francis Ford. Francis Ford treats it as a sale and a purchase at that point. It does not seek deficiencies. It buys the car back at the pay-off figure and then puts it on the books at the low figure of the actual cash value, and so no surplus exists and no accounting is necessary." (Tr. 952)

The same official later testified:

> "Mr. Fournier, at the time that we purchased a vehicle [from the finance company] which was a repossession, Francis Ford's position has been and is, it is our vehicle. Whatever plus or minus cost is incurred, is an internal item based upon something that is ours. We have never calculated whether we made a profit or loss. I have said that." (Tr. 1086)

Testimony to the same effect occurs at Tr. 1133, 1137, and 1378.

This approach to the determination of surpluses is plainly unlawful under the Uniform Commercial Code, which specifies that:

> "A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. *Such a transfer of collateral is not a sale or disposition of the collateral under this Article.*" [§ 9.504(5); ORS § 79.5040(5), emphasis added.]

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liable to the finance company, at most, for the amount owed to the finance company by the customer, and so the price at which it would repurchase the collateral could never exceed the consumer's indebtedness, by definition. There was testimony that in certain instances finance companies might not charge the dealer for all costs of repossession. (Tr. 1494) Where this occurs, the payoff would fall slightly short of the consumer's total indebtedness.

Alternatively, Francis Ford suggests that its practice was to assign an estimated wholesale valuation to each repossessed automobile at the time it was repurchased from Ford Motor Credit or United States National Bank of Oregon. (Tr. 932, 1164, 1251) This wholesale valuation was treated as constituting the "proceeds" from the repossessed vehicle, and in Francis Ford's view, such "proceeds" never exceeded the amount owed by the customer. Francis Ford's wholesale valuation, however, appears to have been based upon a subjective assessment by its own officials, rather than upon the results of an arms-length market transaction, or even upon the estimation of a market reporter, such as the Kelly Blue Book, although Francis Ford argues that it used the blue book plus the judgment of its own used car manager. (Tr. 1251)

Testimony of Francis Ford officials further indicates that they approached whatever subjective valuation of the proceeds they may have undertaken with the attitude that a surplus simply could not occur. One officer testified that he assumed if there were a surplus, the debtor would not have returned the car in the first place, but would have sold it himself. (Tr. 1373) The same witness indicated that Francis Ford had never really given thought to the surplus problem before the Federal Trade Commission's investigation. (Tr. 1167) Another Francis Ford officer testified that in his opinion any repossession would show a loss (Tr. 236) and that there was no way a surplus could occur. (Tr. 508) This is certainly the case if, as a Francis official repeatedly testified, it was Francis' practice to value repossessed vehicles at the *lower* of wholesale value or cost. (Tr. 1371)

Based upon our review of the testimony, we doubt that Francis Ford made any serious attempt to determine whether a surplus might exist with respect to the repossessed cars it repurchased from its lenders. Assuming, however, *arguendo*, that it did in fact attempt to measure surpluses by means of comparing its used car manager's estimate of wholesale value with the amount of indebtedness, it is obvious that this method, also, is impermissible under the law. As Judge Parker

found, the UCC clearly contemplates that the proceeds from a repossessed vehicle will be determined upon the basis of an actual marketplace *sale* of the repossessed collateral. I.D. pp. 31-32. As one court has put it:

> "The purpose of section 9-504(5), U.C.C., is to insure that the value of repossessed collateral is measured by a bona fide sale in the marketplace, and not by an artificial value, usually the ballance due on the debtor's contract, set by a repurchase of guaranty agreement between a seller and a finance company." *Reeves* v. *Associates Financial Services Co., Inc., supra*, 247 N.W.2d at 439.

[*See also First National Bank of Fairbanks* v. *Engler*, 537 P.2d 517, 521 (Alaska, 1975); *Farmers State Bank of Parkston* v. *Otten*, 87 S.D. 161, 204 N.W. 2d 178, 180 (1973).]

The practical wisdom of this plain legal requirement is apparent. To allow determination of an automobile's wholesale value to be based upon a subjective appraisal by the very party obliged to refund any surplus resulting from that appraisal is much like assigning Count Dracula to guard a blood bank. The intolerable conflict of interest that results can be predicted to deprive the debtor of any realistic opportunity to obtain credit for the fair value of the repossessed collateral. Even one of respondent's expert witnesses, who argued that the proceeds should be measured by a wholesale rather than a retail valuation of the repossessed collateral, acknowledged that such wholesale valuation should be the result of a commercially reasonable, arms-length marketplace transaction, in order to avoid so-called "low-balling" by the used car dealer. (Tr. 1631-32)

Since the only marketplace transaction that occurred with respect to repossessed collateral at Francis Ford was the dealership's resale of the collateral at retail, it is that sale by which the existence of any surpluses must be calculated. [7]

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[7] Of the 43 surpluses found by Judge Parker, 41 resulted from resales at retail, one resulted from resale to a Francis employee (CX 2518, 2954) and one from a resale identified as "wholesale" on the order form (CX 3213, 2530). ORS §§83.830 and 83.840 are not inconsistent with Francis' obligation to credit buyers with the proceeds from resale of repossessed cars. *See* Appendix A.

E. Calculation Of Surpluses: Allowable Expenses

Francis Ford argues further that even if the foregoing is so, it is nevertheless entitled to count as expenses an allowance for general firm overhead and profit upon the repossession. [8] We agree, however, with Judge Parker, that only direct "out-of-pocket" expenses are properly counted as "reasonable expenses" incident to a repossession. In the words of Professor Grant Gilmore, the original reporter on Article 9:

> "The rule seems to be well-established that only 'direct' expenses—the out-of-pocket costs of repossession, storage and the like incurred in connection with the particular goods—can be claimed by the secured party. The courts have regularly turned down attempts to include indirect expenses—such as the secured party's general cost of doing business—or to avoid the necessity of providing actual expenses by using the 15 percent formula which is also used in the attorneys' fees clause." *2 Gilmore, Security Interests in Personal Property*, § 43.5 (1963).

The parties have each done a good job of demonstrating the general irrelevancy of each other's case citations on this point, but as best as the Commission can determine, Professor Gilmore's conclusion is supported by what limited precedent does directly address it, and we have discovered no law to the contrary. The principal case is *Cherner* v. *Lawson*, 162 A.2d 492 (D.C. App. 1960) in which the court concluded:

> "The question is whether a defaulting purchaser may be held liable for claimed expenses of resale when such expenses are not directly attributable to the resale. It is our

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[8] As noted at p. 5, *supra*, n.5, Francis Ford did not ordinarily attempt to compute the costs, direct or otherwise, that it believed could properly be deducted. On the one occasion when it did so, after commencement of the Commission's investigation, its tabulations revealed the occurrence of numerous surpluses even allowing for overhead expenses. *See* n. 5, *supra*. Thus, Francis would be in violation of the UCC even were it allowed to charge overhead and reap a second profit on repossession sales.

> opinion that the question should be answered in the negative. . . .
>
> The vendee is liable for direct expenses of resale, such as the salesman's commission which was here allowed; but the vendee is not liable for expenses which are incurred incident to doing business and which would have been incurred by the vendor if no default in this particular sale had ever occurred." 162 A.2d at 493. [9]

In a case strikingly similar to this one, *State* v. *Ralph Williams' Northwest Chrysler Plymouth*, 87 Wash.2d 298, 553 P.2d 423 (1976), *appeal dismissed*, 430 U.S. 952 (1977), a Chrysler dealer was sued under Washington State's "little FTC Act" for, *inter alia*, failure to refund surpluses. In discussing the charges (which were sustained, with restitution ordered) the Washington Supreme Court observed that a study introduced into evidence

> ". . . presented numerous occasions in which the dealership made a profit on repossession sales after deducting the allowable costs of resale. This profit was never returned to the consumer whose car had been repossessed, nor was there even a procedure set up to do so. RCW 62A.9-504 [Washington State's equivalent of UCC § 9-504] requires appellants to return this profit to the consumers." 553 P.2d at 440.

The court did not address the issue of the meaning of "allowable costs" directly, but its use of the term "profit" to characterize the amount to which defaulting consumers were entitled appears to reflect a view that the dealership was not entitled to realize a second profit upon resale of repossessed collateral.

No case that we have been able to discover since enactment of the Uniform Commercial Code addresses the question of

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[9] *Cherner* construed substantially identical provisions of the *Uniform Conditional Sales Act*, § 21, providing for deduction of "reasonable expenses". As the comment to Section 9-504 of the UCC notes, "Subsection (1) in general follows prior law in its provisions for the application of proceeds and for the debtor's right to surplus and liability for deficiency."

allowable overhead expenses head on. [10] This may be, however, because the rule is considered sufficiently well established by earlier authority that creditors have not generally sought to include overhead expenses as charges against the debtor. Certainly it was the practice of other creditors who testified in this proceeding not to charge overhead to the debtor in calculating the existence of a deficiency or surplus, (e.g., Tr. 147, 707, 851, 1520), and echoing Professor Gilmore's sentiments, another major treatise advises that:

> "Any attempt by the secured party to recover a share of his overhead costs for the realization will probably be met by a rule of damages limiting recovery to the cost and expenses directly attributable to repossession and resale." 1 Bender's UCC Service, *Secured Transactions*, § 8.01 at 364 (rev. 1975).

Respondent also suggests at various points in its briefs that the expenses allowed to a secured party should be measured by the standard of Section 2-708 of the UCC, entitled "Seller's Damages for Non-Acceptance or Repudiation." Section 2-708(1) provides that where the buyer wrongfully refuses to accept or repudiates the seller's tender, the measure of damages is

> ". . . the difference between the market price at the time and place for tender and the unpaid contract price

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[10] In reaching this conclusion, we have reviewed the cases cited by respondent in defense of allowing recovery of general overhead expenses. Like many of the cases cited for the contrary proposition by complaint counsel, these cases do not directly confront the issue. *Mt. Vernon Dodge, Inc.* v. *Seattle-First National Bank*, 18 Wash. App. 569, 570 P.2d 702 (1977), dealt only with the question of whether a bank that had repossessed collateral was obliged to dispose of it at retail or whether wholesale disposition would adequately preserve the customer's rights. *Cornett* v. *White Motor Corp.*, 190 Neb. 496, 209 N.W.2d 341 (1973), involved the allowability of repair/reconditioning costs which are acknowledged to be allowable by complaint counsel, and *In re Nibauer*, 9 UCC Rep. Serv. 941 (E.D. Pa. 1971), concerned what is also a direct out-of-pocket cost in the context of the transaction involved there.

> together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach."

If the foregoing is inadequate to place the seller in as good a position as performance would have done, then the measure of damages under UCC § 2-708(2) is:

> ". . . the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale."

In fact, we believe that the wording of this section lends support to complaint counsel's view that the meaning of "reasonable expenses" in Section 9-504 must be limited to direct, out-of-pocket expenses, because it indicates that the drafters of the UCC were quite aware of, and able to express the concept of "profit (including reasonable overhead)" as distinct from "costs" or "expenses", when they thought it appropriate to do so. Reference to "profit", in Section 2-708 compared to "reasonable expenses" in Section 9-504 suggests a clear intent to exclude profit from the purview of "reasonable expenses."

As Judge Parker points out at I.D. pp. 28-29, Section 2-708 simply does not, by its terms, govern the rights of the parties following a repossession. It applies only where there has been repudiation or non-acceptance by the buyer. In the transactions involved here, the buyers have already accepted the goods, but subsequently defaulted. Nor do we see anything anomalous about this diverse treatment of two distinct situations. A seller who tenders goods and finds them wrongfully rejected is entitled to make a profit, including overhead, on those goods. In the repossession situation, however, that profit is already included in the sales price, which the seller automatically recovers in full from the proceeds of the repossession sale before being required to pay any surplus. It is only a second profit, or a second share of overhead on the resale of the same goods that the secured party is denied by the law.

To be sure, there are respectable economic arguments as to why the foregoing ought not to be so, and why a secured party ought to be allowed to realize a second profit on repossessed goods. Francis Ford argues at great length that it is not economically sound to deprive the seller of an allowance for overhead and profit, because these are genuine expenses and add value to the collateral. Complaint counsel argue, to the contrary, that the disposition of repossessed collateral must be viewed as the process of liquidating a debt (even though it takes the form of selling a car) and that it would be just as unfair to allow the creditor to realize a second profit or amortize overhead on its debt collection activities as it would be to allow that to be done where the debt collection took the form of bringing a lawsuit. [11] Each of these views has something to commend it, and we have discussed each at greater length in Appendix B to this opinion. It is not the Commission's role in this proceeding, however, to determine what the rights of Oregon consumers should be. It is only our role to determine whether consumers have been deprived of rights that they now possess. We think that the weight of relevant authority plainly favors complaint counsel's position and that from the standpoint of public policy, this position is an eminently sound one.

We conclude, therefore, that Francis Ford has systematically failed to account for, and to refund to consumers, surpluses to which they are entitled under state law. We further conclude that this practice is an unfair practice under Section 5 of the Federal Trade Commission Act.

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[11] If a secured party, instead of repossessing and reselling the collateral, chose instead to bring a lawsuit to recover the entire contract balance, it would not be suggested that the creditor could charge the debtor for overhead allocable to the time required by the creditor and its employees to prepare for the lawsuit. That is simply viewed as a cost of doing business that is figured into the profit that the seller makes on each sale. In the same fashion, complaint counsel argue, when the seller chooses to collect its debt by means of repossession and resale, that should not be viewed as a new profit-generating activity.

F. Section 5 And The Failure To Refund Surpluses

As Judge Parker concluded, and responent does not contest, the failure to account for and refund surpluses is an unfair practice within the contemplation of Section 5 of the Federal Trade Commission Act. In *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), the Supreme Court recognized that the Commission, in carrying out its statutory authority to prevent "unfair methods of competition and *unfair* or deceptive *acts or practices*" may proscribe practices that are neither "deceptive" nor violative of the letter of the antitrust laws. 405 U.S. at 244. *See also Spiegel, Inc.* v. *FTC*, 540 F.2d 287, 292-95 (7th Cir. 1976); *Heater* v. *FTC*, 503 F.2d 321, 322-23 (9th Cir. 1974); *State* v. *Ralph Williams' Northwest Chrysler Plymouth*, *supra*, 553 P.2d at 440, n.19 (construing Washington's little FTC Act to prohibit failure of secured party to refund surplus contrary to requirements of Washington's version of UCC § 9-504).

The criteria that the Commission has previously enunciated to guide its assessment of unfairness, and that have met with approval by the Court, are three:

> "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." Statement of Basis and Purpose of Trade Regulation Rule 408 [Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking]. 29 Fed. Reg. 8324, 8355 (1964), cited at 405 U.S. 244, n.5.

While the Court recognized that all three elements need not necessarily be shown in order to demonstrate unfairness, all three are found in this case. The failure to account for and refund surpluses (based upon the proceeds of a commercially reasonable resale of collateral by a secured party acting as a fiduciary for the debtor, endeavoring to obtain the best possi-

ble price, and deducting only reasonable out-of-pocket expenses attributable to the repossession) is contrary to public policy established by the uniform law of 49 states and the District of Columbia (*see* discussion at pp. 2-12 *supra*). No more certain source of public policy than state law can be imagined.

The failure to accord consumers their right to a refund is, as well, oppressive to consumers and a cause of substantial injury to them. The amount of injury in this case can be measured by the amount of money (in excess of $15,000) withheld without notice by Francis Ford in 1974-75 from consumers who were entitled to it by state law. A clearer form of oppression and consumer injury cannot be imagined. [12] For these reasons we hold that the failure to account for and refund surpluses by a party obliged under state law to do so is an unfair practice within the meaning of Section 5 of the Federal Trade Commission Act.

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[12] Judge Parker, in finding the challenged practice unfair, concluded that it contravened public policy and was "immoral, unethical and unscrupulous." (I.D. p. 38) He also recognized that Francis Ford's customers had been injured by not receiving what was lawfully owed to them (I.D. p. 38), but held that complaint counsel had not met their burden on the question of proving "substantial injury to defaulting consumers." (I.D. p. 39) The Judge's conclusion was apparently based upon testimony by experts from Francis Ford who argued that by crediting defaulting consumers with the retail resale value of their car, and not allowing the dealer to deduct an allowance for general company overhead and a profit upon the resale, defaulting consumers were being given a windfall. Thus, Judge Parker concluded that while the law clearly entitled consumers to a surplus calculated in the indicated fashion, depriving consumers of this surplus injured them only in a narrow legal sense, not in an "economic" or some broader moral sense.

We believe, however, that the distinction, in this context, is not a helpful one. How to divide the costs and proceeds of a repossession transaction between creditor and debtor is a matter that is determined by law, and the legal standard is, accordingly, the best measure of the injury that results from the failure of one party to adhere to its statutory obligations. To ask whether, in some broader econom-

Our disposition on the issue of unfairness renders it unnecessary for us to consider complaint counsel's argument that the challenged practices are deceptive, as well.

G. Procedural Challenges

Francis Ford has raised a variety of procedural challenges to the validity of this proceeding, which we believe are without merit. Francis argues that the Commission should have proceeded by rulemaking rather than by adjudication, because in its view the purpose or the result of this proceeding has been to "impose a new and costly legal obligation" on all automobile dealers, that is in the nature of a rule as defined in the Administrative Procedure Act. (Francis Ford Appeal Brief, p. 12)

We believe that Francis' argument somewhat misconstrues the theory of this case. This is apparent in Francis' discussion on the rulemaking-type issues that it believes are at issue here, *viz.*,

> ". . . a determination whether the costs and expenses *presently borne by defaulting buyers* should instead be borne in the first instance, by automobile dealers, and inevitably, in the second instance, by all automobile purchasers. . . . Such important and far reaching legal, economic and social decisions cannot and should not be handled by adjudication where the scope of testimony is so limited and the dealer cannot afford to marshall the economic and social arguments necessary to place the issues in their proper national perspective." (Francis Ford Appeal Brief, p. 14, emphasis added.)

As we have made clear, it is in no measure the purpose of this proceeding to determine how repossessed collateral should be sold, and how the proceeds should be divided. That determination has already been made by the legislatures of the various states. It is only the Commission's purpose in this proceeding

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ic or moral sense, a given consumer "deserves" the surplus to which the law entitles him or her (and is thereby injured if deprived of it) or whether a given creditor "deserves" the deficiency to which the law entitles it, is to raise an insoluble question.

to ensure that defaulting debtors are accorded rights that are *already theirs* under state law. The $15,000 in surpluses wrongfully withheld by Francis Ford from its customers in 1974-75 may indeed be viewed as a cost "presently borne by defaulting buyers" but that is so only because Francis Ford has wrongfully decided to allocate the proceeds from its repossession sales in a fashion contrary to the requirements of state law.

If attorneys worked for free, the customers of Francis Ford upon whose automobiles surpluses were realized would be able to sue Francis Ford, obtain discovery of its records to determine the results of its resales of repossessed collateral, and recover their surpluses. In fact, of course, attorneys do not work for free, and most consumers have no realistic way to determine whether or not a surplus has been realized upon the resale of their car unless the automobile dealer voluntarily complies with applicable state law, or is in some fashion forced to do so. *See Spiegel, Inc.*, 86 F.T.C. 425, 446, *aff'd in relevant part*, 540 F.2d 287 (7th Cir. 1976); *Barquis* v. *Merchants Collection Ass'n of Oakland, Inc.*, 7 C.3d 94, 101 Cal. Rptr. 745, 496 P.2d 817 (1972).

In this proceeding, the Commission has not attempted to determine which of various competing economic views as to how repossession proceeds should be allocated is superior. There is no attempt in this proceeding to announce a hitherto unarticulated concept of what is "unfair" within the meaning of Section 5 of the Federal Trade Commission Act. Our role, rather is simply to determine how *existing public policy* treats the rights of a defaulting purchaser in a repossession, and to ensure that the purchaser is not deprived of his rights by the actions of secured parties.

To be sure, the principles articulated herein may have application to others situated similarly to Francis Ford, to the extent that others may have committed similar violations of law. And, indeed, because violations with respect to surpluses were alleged to be widespread, parties other than Francis Ford have been sued as part of these proceedings. But any adjudication is likely to involve the articulation of a principle

with potential applicability to others similarly situated, and as the courts have recognized, administrative agencies must be allowed discretion in determining whether to proceed by rulemaking or adjudication:

> ". . . any rigid requirement to that effect [requiring rulemaking] would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. *In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.*" *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947) as quoted in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-93 (1974).

Even where a genuinely new principle of law is involved, its announcement may properly be made in an adjudicative context:

> "The views expressed in *Chenery II* and *Wyman-Gordon* make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *NLRB* v. *Bell Aerospace*, *supra*, 416 U.S. at 294.

This case involves the conduct of a specific Ford dealership, determination of the acts and practices in which it has engaged, and determination of the applicable legal standard by which its conduct should be judged. Although both sides have attempted to bolster their positions by resort to expert witnesses trained in economics and accounting (a not uncommon occurrence in adjudications), resolution of this case does not require the sort of wide-ranging social and economic inquiry that is best suited to rulemaking. Moreover, this case involves the possibility that the Commission will eventually seek consumer redress for unlawfully withheld funds, pursuant to 15 U.S.C. § 57b. That

statutory provision allows the Commission to obtain redress for consumers who have been injured by past unlawful practices with respect to which the Commission has issued an order to cease and desist. A rulemaking could not similarly provide a basis on which to seek consumer redress for past illegalities, and this is a further important reason why this matter is properly addressed in an adjudicative context. [13]

Respondent observes that the Commission is currently conducting a Trade Regulation Rule Proceeding concerning Credit Practices, 16 CFR § 444, which involves, *inter alia*, consideration of a rule governing the manner in which all creditors might be required to dispose of repossessed collateral. The rulemaking proceeding, however, concerns different issues from those here, and nothing that may be determined in that proceeding can alter the fact that Francis Ford's past failure to account for and refund surpluses in accordance with requirements of state law is an unfair and deceptive practice.

Francis also alleges that for the Commission to proceed against it after having accepted consent settlements from co-respondents Ford and Ford Motor Credit Corp. is an abuse of discretion. Francis argues that the proceeding should be dropped, or consolidated with parallel proceedings aganst Chrysler and General Motors respondents.

To the extent that Francis' position involves the claim that it has been impermissibly singled out, we cannot agree. While the Commission plainly does not have "unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry", *FTC* v. *Univeral Rundle Corp.*, 387 U.S. 244, 251 (1967), it also "cannot be expected to bring simultaneous proceedings against all of those engaged in identical practices." *Marco Sales Company* v. *FTC*, 453 F.2d 1, 6 (2d Cir. 1971) quoted in *Ger-Ro-Mar, Inc.* v. *FTC*, 518 F.2d

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[13] In suing Francis' co-respondents Ford Motor Co. and Ford Motor Credit Corp., the Commission gave notice to them as well that consumer redress might be sought, and the consent order signed by these parties provides that Ford-owned dealerships shall refund surpluses wrongfully withheld prior to the date of the order.

33, 35 (2d Cir. 1975). The action here in no way threatens Francis Ford's existence vis-a-vis other competitors not named in the complaint that may be engaged in similar practices. At worst, Francis stands in the position of the respondent in *Ger-Ro-Mar, Inc.* v. *FTC*, *supra*, whose position the Second Circuit clearly distinguished from that of the respondent in *Marco Sales Company* v. *FTC*, *supra* (relied on by Francis) in the following fashion:

> "The situation here is distinguishable. The Commission has not given its blessings to [respondent's] competitors while condemning [respondent]. It has not yet proceeded against others and an affirmance of this order might well trigger agency action against comparable selling plans." 518 F.2d at 35.

See also Porter & Dietsch v. *FTC*; Nos. 78-1324 and 78-1497, slip op. at 21-22 (7th Cir. Aug. 8, 1979).

Here, in fact, the Commission *has* proceeded against some other parties for allegedly engaging in similar practices. That it may not have proceeded against all such parties cannot be a bar to proceeding against some. And, without doubt, finality of the Commission's order in this matter will facilitate its obtaining relief in other instances in which the practices involved here may have occurred or be occurring, by operation of Section 5(m)(1)(B) of the Federal Trade Commission Act, 15 U.S.C. § 45(m)(1)(B). [14]

Francis also suggests that the order entered against Ford Motor Co. and Ford Motor Credit Corp. obviates the need for separate relief against Francis, because under the consent

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[14] This provision of law permits the Commission to seek civil penalties against a party who engages in a practice previously found by the Commission to be unlawful in an adjudicative proceeding "with actual knowledge that such act or practice is unfair or deceptive and is unlawful." In this Section Congress answered the frequent complaint of businesses that were sued for particular violations of law while their competitors were not, by making it possible for the Commission to obtain civil penalties against those competitors without the necessity of parallel adjudicatory actions.

order, the settlors are obliged to take steps to ensure that all Ford dealers adhere to UCC requirements regarding surpluses. In fact, however, the relief ordered here exceeds that involved in the consent order in several respects. Most importantly, under the consent order, the settlors will merely report to the Commission any instances in which non-Ford-owned dealers have not refunded surpluses. The order does not ensure prospective repayment. It would remain necessary, where non-payment is detected, for the Commission to take legal action against the dealer involved, of precisely the same sort as has been taken here. [15] Moreover, the consent order would not require Francis Ford to notify customers of pre-order surpluses wrongfully withheld from them, or permit the Commission to seek consumer redress to ensure refund of those surpluses, pursuant to 15 U.S.C. § 57b.

A second part of Francis' contention is that by leaving it to contest alone the legality of its practices, the Commission has proceeded arbitrarily. With this we cannot agree either. Francis Ford has had only the burden of defending its own practices, which it has done well and forcefully, though, in our view, without success. The issues here involve only the nature of Francis Ford's repossession practices, and their legality, issues that are fully suited to exploration in the context of this lawsuit. The complaint settled against Ford Motor Co. and Ford Motor Credit Co., and the complaints still outstanding against General Motors and Chrysler respondents, while they overlap the charges here to some degree, also involve far different issues from those adjudicated here, going to the liability of vehicle manufacturers and finance companies for alleged failures to refund surpluses. Consolidation of all these cases would not help Francis Ford to explain the manner in which it disposed of repossessed cars in 1974-75, detailed above, nor do we think that other counsel could do a materially

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[15] Of course, if a final order is entered in this matter, it will become easier to take legal action against competitors of Francis Ford who fail to refund surpluses, by operation of 15 U.S.C. § 45(m)(1)(B). *See* n.14 *supra*.

better job of articulating the duties of a secured party with respect to the collateral than has been done by Francis' able lawyer. Of course, should any subsequent litigation that may ensue regarding similar issues result in the Commission's concluding that it has decided this case incorrectly, modification of our decision in this case would quickly follow. [16]

Francis also assigns as error various procedural rulings made by Judge Parker denying admission of documents of other Ford dealers, denying admission of the Presiding Officer's report in the Commission's Trade Regulation Rulemaking on Creditor's Remedies, and granting certain Requests for Admissions made by complaint counsel. We think that each of these rulings represented a proper exercise of the law judge's discretion, and Francis has not indicated how it was in any way injured or how our disposition of the case might be different assuming *arguendo* that the ALJ's rulings were in error.

Accordingly, Francis Ford's procedural challenges to this proceeding are rejected.

H. Order

Complaint counsel have argued that the ALJ's recommended order does not go far enough; respondent contends that no order should be entered for various reasons previously discussed and rejected.

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[16] Interestingly, it appears that only *complaint counsel* sought consolidation of the Ford, Chrysler, and General Motors cases, while Francis remained mute. Presumably its present assignment of nonconsolidation as fatal error results from the removal of the two Ford respondents. Francis also contends that the National Automobile Dealers Association should have been allowed to intervene. In fact, it was permitted to intervene in limited fashion, and Judge Parker indicated that he would "be favorably disposed toward a renewal of NADA's application to intervene on liability issues" were it later to emerge that the three Ford respondents would not adequately represent the interests of NADA members. NADA did not renew its petition when Ford Motor Co. and FMCC dropped out of the litigation and we do not see that Francis Ford may allege as error the failure to grant NADA what it did not even seek.

Complaint counsel contend that the Commission should require Francis Ford to refund surpluses wrongfully withheld. Respondent contends that this would amount to requiring "restitution", which the Ninth Circuit Court of Appeals has said the Commission may not do. *Heater* v. *FTC*, *supra*, 503 F.2d at 327.

Requiring repayment of wrongfully withheld surpluses is sufficiently analogous to requiring restitution of other monies wrongfully withheld that it would probably be treated in similar fashion by a reviewing court. While the Commission has previously noted its respectful disagreement with the *Heater* decision in *Holiday Magic, et al.*, 84 FTC 748, 1045 n. 11 (1974), *Heater* is the governing precedent in the circuit in which respondent does all or nearly all of its business. Accordingly, we believe that no purpose would be served by requiring in the order that we shall enter in this case that respondent refund wrongfully withheld surpluses. [17] The Commission does have available to it means to seek repayment of wrongfully withheld surpluses by means of a suit for consumer redress, pursuant to Section 19 of the FTC Act, 15 U.S.C. § 57b.

We agree with complaint counsel that the record of this case satisfies the statutory requirements of 15 U.S.C. § 57b for consumer redress. At such time as the Commission's order in this case becomes final, the Commission will consider whether to seek consumer redress for surpluses previously withheld, in accord with the provisions of 15 U.S.C § 57b.

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[17] The *Heater* court drew a careful distinction between so-called prospective and retrospective relief, and disallowed only the ordering of restitution for violations of Section 5 occurring prior to entry of an order forbidding them. There is no question that the Commission may order a party to cease violations of the law and simultaneously require that where such *future* violations result in (or consist of) withholding of money from consumers, that money be repaid. *See Windsor Distributing Co., et al.*, 77 FTC 204, 222 (1970), *aff'd. per curiam*, 437 F.2d 443 (3d Cir. 1971). Accordingly, our order requires respondent to remit all surpluses that are realized following the effective date of the order.

Complaint counsel also urge that the law judge's requirements that Francis Ford identify and notify customers of surpluses previously realized be expanded to cover all surpluses realized back to 1971 (4 years before the Commission's first investigatory contact with Francis). The law judge ordered that customers be notified of surpluses dating back to May 1, 1974, copying a provision in the consent order signed by respondent Ford Motor Co. requiring its company-owned dealers to notify customers of past surpluses.

Complaint counsel observe, correctly, that the consent order is not an inflexible measure of the standard that should be applied to Francis Ford, *e.g.*, *SCM Corp.* v. *FTC*, 565 F.2d 807, 814 (2d Cir. 1977). On the other hand, the consent order imposes no obligation of prior notification upon non-Ford-owned Ford dealers, of which Francis is one, and so *any* requirement of prior notification will impose upon Francis an obligation not being concurrently imposed upon other Ford dealers that may have failed to refund surpluses. As noted before, in discussing Francis' objections that it has been "singled out", we do not think that this objection is determinative either. Concern must be shown, after all, for the *victims* of consumer abuses, even though it is not always possible to redress every individual occurrence in equal fashion. [18] Weighing these competing equities, we believe that notification of consumers with respect to all surpluses realized from the date of the complaint in this matter (February 10, 1976) strikes an appropriate balance, and we shall so order. [19]

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[18] Again, as noted before, non-Ford-owned dealers, along with Ford-owned dealers, will be subject to the same prospective legal obligations as Francis Ford by virtue of the consent order signed by the settling parties, and by application of the holdings in this case to non-parties, pursuant to Section 5(m)(1)(B) of the FTC Act.

[19] This is, of course, without prejudice to the Commission's right pursuant to 15 U.S.C. 57b to seek redress for monies wrongfully withheld up to three years prior to the date of the complaint. We have modified the ALJ's proposed Letter of Notification (Attachment C to the Order) to omit references to a Commission order requiring respondent to repay surpluses, because we have entered no such order.

Complaint counsel also urge that the Commission require Francis Ford to include a notice in all consumer credit contracts informing customers of their surplus rights in the event of default and repossession. We do not believe it necessary to burden every one of Francis' contracts with such language in order to remedy the violations that have occurred here. The order obliges Francis, on pain of civil penalties, to compute and refund surpluses. Only if Francis disobeyed this order requirement would contractual notice to consumers be of any possible use, and then only if the notice prompted some defaulters to seek an accounting by Francis which might thereby lead to discovery of its failure to repay a surplus. At present it is the practice of Francis' finance companies to notify defaulters *(when repossession occurs)* of their right to a surplus (if one is subsequently realized). This notice is likely to do far more than that proposed by complaint counsel to induce consumers to protest if they believe they have not been treated fairly. Under the circumstances, we believe that the very slight, marginal protection that might be afforded by insertion of a clause in the contracts of those consumers who ultimately default does not justify imposing upon Francis the burden of placing this notice in each and every contract, in most of which it would serve no purpose germane to preventing violations of law.

Complaint counsel also urge that the Commission add a sentence to the law judge's order to emphasize that as a retail dealer, Francis Ford's resale of repossessed collateral will ordinarily occur at retail. We believe, however, that the law judge dealt adequately with this issue in his definition of "best possible price", which Francis is required by the UCC and the order entered herein to seek when it resells a repossessed car.

Respondent objects to the ALJ's proposed order because it assertedly prohibits respondent from exercising rights available to it under Section 9-505 of the Uniform Commercial Code

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To the extent that respondent may prefer to refund surpluses withheld in lieu of sending the Letter of Notification, the Commission will accept evidence of such direct refunds as compliance with Paragraph III(D).

to retain collateral in satisfaction of the debt after obtaining a waiver from the debtor of the debtor's right to any surplus.

Paragraph II(E) of the order entered by Judge Parker would prohibit Francis Ford from

> "Taking any action to obtain or attempt to obtain or bring about a waiver of a customer's right to a refund of surplus, including such waivers as may arise from failure to object to a proposal to retain the vehicle."

In defense of this paragraph, complaint counsel observe that the wholesale use of waivers could eviscerate the rest of the order, by depriving consumers of their right to a surplus in all cases in which a surplus might arise. This, however, is hardly a complete defense of the ALJ's order. If complaint counsel's theory of the case is that respondent has engaged in unfair practices by disregarding public policy enshrined in state law, counsel cannot shrink from that theory in those instances in which state law is not as favorable to the rights of consumers as one might desire.

In response to this objection, complaint counsel argue further that the waiver provisions of Section 9-505 would so rarely (if ever) be applicable to the circumstances of Francis Ford's repossessions that a flat prohibition upon any use of waivers is the clearest way to resolve the question, and does no violence to Francis Ford's existing rights under Oregon law. In particular, counsel observe that Section 9-505 by its terms refers to proposals to *retain* the collateral, something that Francis Ford is unlikely to wish to do.

While we can find no relevant case law defining the scope of Section 9-505 as it relates to automobile repossessions, the official draftsmen's comments lend considerable support to complaint counsel's position. Comment 1 to Section 9-505 states:

> 1. Experience has shown that the parties are frequently better off *without a resale* of the collateral; hence this section sanctions an alternative arrangement. In *lieu of resale* or other disposition, the secured party may propose under subsection (2) that he *keep the collateral as his own*, thus discharging the obligation and abandoning any claim for a deficiency. [emphasis added]

In the Draftsmen's Statement of Reasons for 1972 Changes in Official Text, the Draftsmen summarized the purpose of Section 9-505 as follows:

> Under subsection (2) [9-505(2)] of this section the secured party may in lieu of sale give notice to the debtor and certain other persons that he proposes to retain the collateral in lieu of sale.

The foregoing language strongly suggests that waiver of surplus and deficiency rights under 9-505 is appropriate only when prompt resale of repossessed collateral in the ordinary course of business is not contemplated by the creditor. Where collateral is subject to pronounced fluctuations in its market value, it may well transpire that both creditor and debtor will be better off without a prompt resale. For example, where stocks are pledged as security for a debt, and their price is depressed at the time of default, a creditor might well prefer to retain the stocks indefinitely in hopes of significant appreciation rather than reselling at once. Th debtor can hardly complain, because the immediate resale to which the debtor is entitled would only yield a deficiency. The creditor, in turn, may be willing to forego this deficiency in the hope of realizing a substantial profit at some indefinite future time. The same considerations may apply to a going business that is repossessed. The creditor may be better off running the business for an indefinite period than he would be selling it immediately and suing the debtor for a deficiency. In cases such as these, Section 9-505's waiver provisions are clearly appropriate.

It is less clear that waivers would ever serve the purpose contemplated by the drafters of the UCC in the context of automobile repossessions. Automobiles generally depreciate steadily over time, and so it would be most unlikely that an automobile dealer would wish to retain an automobile in inventory in the hope that by doing so its value would increase. That being so, use of Section 9-505 by an automobile dealer, particularly one not disposed to pursue deficiency judgments, would appear calculated solely to extinguish surplus rights of consumers, which we do not believe was the intended purpose of Section 9-505. *See also* 2 Gilmore, *supra*, § 44.3 at 1226-27.

The foregoing caveats notwithsanding, the record of this case does not allow us to conclude that in every imaginable instance it would be contrary to the provisions of Section 9-505 for a car dealer to seek to obtain a waiver of a debtor's right to a surplus. Conceivably, a dealer might wish to retain a particular car for its own use, in which case it should be allowed to propose to do so. Accordingly, we shall modify Paragraph II(E) of the ALJ's order so as to allow Francis Ford to take advantage of such rights as it may have under Section 9-505. To prevent abuse of this proviso, however, the order provides as § 9-505 contemplates, that a waiver may not be sought unless the creditor intends to retain the collateral for its own use for the immediately foreseeable future, rather than to resell the collateral in the ordinary course of business. The order also specifies that if it does seek waiver, Francis may not imply that it will be foregoing its right to a deficiency judgment unless in fact, it is Francis' practice to pursue deficiency judgments. To induce the renunciation of a debtor's right to a possible surplus in return for the creditor's illusory renunciation of rights that it never asserts would be a misleading practice in violation of Section 5.

Responent's principal objection to the order (other than that no order is justified on the facts) is that it will allegedly raise the cost of credit or the cost of used cars, by increasing the repossession expenses of car dealers, which expenses must be passed on to consumers.

To be sure, if Francis Ford is now retaining an average of $15,000 every two years that it is obliged under state law to repay to defaulting consumers, and if it is forbidden in the future from retaining those monies, then in order to maintain its profits at the same level Francis Ford will either have to reduce its costs of doing business or else raise the price of each car it sells by two or three dollars to recoup the loss of illegally-retained revenue. This will not result in a net loss to consumers, but it will result in a transfer of funds from all consumers to a smaller group of consumers—those entitled to surpluses under state law, Section 5 of the FTC Act, and the Commission's order.

We see nothing wrong in the foregoing result. If the consequence of Francis Ford's adherence to the law is a transfer of resources from itself and its consumers to one sub-group of its consumers, that is because of a clear public policy decision made by state legislatures when they adopted a formula (the UCC), designed to allocate the costs of default between creditor and debtor.

The same arguments made by Francis Ford about costs could be used to justify disregard of any commercial obligation, *e.g.*, refusal to do warranty repairs (they cost money, which must be recouped from all car buyers), the use of fraudulent sales practices to sell cars for more than they are worth (the money realized because of the fraud allows other cars to be sold for less) and so forth. Public policy prescribes, however, that warranties should be honored (to protect purchasers of inferior merchandise), that fraud should not be used to induce sales (to protect innocent victims from oppression), and that defaulting debtors are entitled to recover their equity in collateral in the amount by which the resale price of their car exceeds the amount they owe plus direct, out-of-pocket costs of repossession. Many debtors default for reasons beyond their control. Recognition of this fact, among others, underlies a historical trend that has seen the stocks and jail replaced by progressively more humane (albeit marginally less effective) collection techniques. In similar recognition of the varied rights and responsibilities of creditor and debtor, the law imposes upon the debtor liability for all direct, out of pocket costs of repossession (an obligation likely to deter those defaults that are preventable) but provides for preservation of the debtor's equity in repossessed collateral by imposition of a duty on the creditor to resell in a commercially reasonable manner, attempt to obtain the best price, and not charge the debtor a second time for the creditor's overhead or profit. That these conscious policy decisions may have the effect (as do most policy decisions) of allocating costs in certain ways does not justify their disregard.

With the changes noted above, and minor technical modifications, we have entered the order proposed by the administra-

tive law judge as our own, and denied the cross-appeals of the parties. [20] In addition, we have appended a synopsis summarizing our holding in this matter, so as to facilitate application of the principles articulated herein to any party that may engage in similar practices, as contemplated by 15 U.S.C. § 5(m)(1)(B).

Appendix A— Interrelationship of ORS §§ 83.830 and 83.840 and ORS § 79.5040

ORS §§ 83.830 and 83.840 provide that where the amount of a borrower's unpaid loan obligation at the time of default in the repayment of a retail installment contract (§ 83.830) or a loan agreement (§ 83.840) exceeds $1250, the seller (or lender) may recover from the buyer or borrower "any deficiency that results from deducting the fair market value of the goods or motor vehicles from the amount of the unpaid loan obligation." [ORS § 83.830(b); ORS § 83.840(b)] Respondent argues that this provision entitles it to determine the amount of deficiencies and the existence (or non-existence) of surpluses, by crediting the customer with an estimate of the "fair market wholesale value" of his car at the time it is repossessed, notwithstanding that an actual sale at retail (or wholesale) might yield a better price.

Several observations are pertinent. The first is that ORS §§ 83.830 and 83.840 were plainly not intended to repeal the protections already afforded defaulting purchasers by the Uniform Commercial Code in effect in Oregon. ORS § 71.1040 entitled "Construction against implicit repeal" states:

> "The Uniform Commercial Code being a general law intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by sub-

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[20] On our own motion we have deleted Paragraph IV(C) of the ALJ's proposed order, regarding retention of records. Other order provisions should be sufficient to permit effective monitoring of compliance by the Commission.

sequent legislation if such construction can reasonably be avoided."

Further indication that the Oregon legislature does not consider that Oregon code provisions pertaining to debtor's surplus rights were in any way affected by ORS §§ 83.830 and 83.840 comes from the fact that in 1973, two years following the passage of ORS §§ 83.830 and 83.840, the Oregon legislation expressly modified ORS § 79.5040 (the part of the Oregon Code corresponding to § 9-504 of the UCC) in respects not material to this litigation, and *re-enacted* the entire section, without modifying those parts of ORS § 79.5040 that could be argued to have been repealed or otherwise affected by ORS §§ 83.830 and 83.840. In similar fashion, Oregon courts have decided at least two cases involving surpluses calculated under ORS § 79.5040 subsequent to the enactment of ORS §§ 83.830 and 83.840 (although the cases involved transactions occurring prior to enactment) without making any reference whatsoever to the alleged intervening repeal of the governing provision of law. *Chaney v. Fields Chevrolet Co.*, 264 Or. 21, 503 P.2d 1239, 11 UCC Rep. Serv. 997 (1972); *Webster v. G.M.A.C.*, 267 Or. 304, 516 P.2d 1275 (1973).

It seems thus apparent that ORS §§ 83.830 and 83.840 must be construed in a fashion that is harmonious with pre-existing Oregon law governing surplus rights of debtors. That is further apparent inasmuch as ORS §§ 83.830 and 83.840 on their face are intended to confer added protections upon defaulting buyers, and it would be perverse to construe them in a fashion that would, in effect, diminish those protections.

ORS §§ 83.830 and 83.840 can plainly not be harmonized with pre-existing Oregon law if the term "fair market value" is construed, as respondent would construe it, to mean in all cases "*estimated* fair market *wholesale* value." The effect of such an interpretation would be to deprive the defaulting car buyer of his right under other provisions of the Oregon Code to have the proceeds from his repossessed vehicle determined by a commercially reasonable arm's length market transaction, by a secured party obliged to act as a fiduciary and to make reasonable efforts to resell the collateral for the best possible

price. Moreover, the effect of this reading in particular instances could be to yield a surplus and deficiency in the same transaction. For example, a car dealer might repossess an automobile and assess a deficiency based on his estimate of fair market wholesale value. When the car was later resold at retail by the dealer, however, the sale might give rise to a surplus under ORS § 79.5040.

It thus seems apparent to us that if ORS §§ 83.830 and 83.840 are to be read in harmony with other provisions of Oregon law the term "fair market value" must be construed to mean, as Judge Parker also concluded, "fair market retail value," at least in those circumstances in which other provisions of Oregon law would result in resale at retail of the repossessed collateral. Where the UCC would permit wholesale disposition of collateral, "fair market value" may be construed as "fair market wholesale value" and acts as a check upon the actual wholesale disposition to ensure that a deficiency cannot be based upon a wholesale disposition that fails to yield "fair market value."

While the Uniform Commercial Code requires that resale of repossessed collateral be made in a "commercially reasonable" fashion, and courts have construed the Code to impose upon the secured party an obligation to seek to obtain the best possible price for the debtor's account (*supra* at 4; I.D. pp. 33-35) the price actually realized is not made the definitive test of the reasonableness of the procedures employed, UCC § 9-507(2); e.g., *James Talcott, Inc. v. Reynolds* 165 Mont. 404, 529 P.2d 352, 354, (1974). As a result, it is conceivable that a transaction satisfying the UCC's requirements of "commercial reasonableness" could yield less than fair market wholesale or fair market retail value. Moreover, the term "commercially reasonable" is itself open to considerable variation in interpretation, and commentators have remarked upon the fact that wholesale auctions of automobiles are sometimes undertaken in a manner that may not yield a fair market return, however defined. *See, e.g.*, Schuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 Stan. L. Rev. 20 (1969). Under these circumstances, it appears

to us that ORS §§ 83.830 and 83.840 were designed simply to ensure against the possibility of defaulting consumers being pursued for deficiencies based upon resale of collateral that yielded less than "fair market value." The term "fair market value" was intended simply to act as a check upon the results of an actual wholesale or retail disposition,* and was not intended to *deprive* the consumer of the benefits of such an actual marketplace disposition, which, after all, should *ordinarily* be the best measure of what fair market value is.**

Appendix B— Wholesale vs. Retail Disposition of Repossessed Collateral and the Definition of "Reasonable Costs" of Repossession

The following discussion is intended to address the thoughtful submissions of both sides with respect to the underlying economic rationale for the legal requirements imposed upon a secured party in possession of repossessed goods. We have included this discussion in an appendix because we do not believe that it is relevant, strictly speaking, to the outcome of this case. Even were we to conclude that the policy con-

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* Under the Uniform Commercial Code, a court upon finding that a sale of collateral has been conducted in a commercially unreasonable manner, or otherwise in violation of the Code, may nevertheless award the creditor a deficiency based on the actual fair market value of the collateral rather than its resale price. See *Levers* v. *Rio King Land & Inv. Co.*, ____ Nev. ____, 560 P.2d 917, 920 (1977), but this presumes an initial showing of creditor malfeasance.

** Complaint counsel contend that the only purpose of ORS §§ 83.830 and 83.840 was to impose a 90 day deadline for filing deficiency suits. While this was plainly one purpose of the provisions, we cannot agree that it was the only one, since that purpose could have been accomplished without all the language that is at issue in this proceeding. We do agree with complaint counsel, however, that the Code provisions in question were not intended to detract from existing rights of the defaulting debtor to receive back a surplus where one results from commercially reasonable resale of the collateral.

siderations underlying the UCC's treatment of repossession proceeds were infirm, this would not alter respondent's legal obligations. In fact, we believe that there are strong policy bases underlying the UCC's requirements and while strong arguments can be marshalled in support of a contrary view, these cannot be a reason for allowing disregard of the law.

Respondent has presented expert testimony in support of its view that an automobile dealer should be able to include an allowance for general overhead and dealership profit as part of the allowable expenses incident to the resale at retail of repossessed collateral. Alternatively, respondent suggests that the "proceeds" from a repossession should be measured simply by some estimate of the wholesale value of repossessed collateral at the time of repossession, even though no resale of the collateral may be undertaken except at retail.

Respondent's position is that the true value of repossessed collateral is most fairly measured by its wholesale value at the time of repossession. If the repurchase automobile dealer resells the collateral at retail, that dealer incurs both direct costs, such as out-of-pocket expenses of reconditioning and repair (for which the dealer can charge under the UCC), and indirect costs, such as a pro-rated share of general dealership expenses, advertising, lot rental, and the like. These indirect costs, just as much as the direct ones, contribute to the increase in value realized upon a car when it is sold at retail as compared to what it might fetch if sold at wholesale immediately after repossession. Accordingly, respondent argues, the dealer should be allowed to deduct an allowance for such indirect costs prior to crediting the consumer with any surplus. As for profit on the resale, respondent argues that the sale of a repossessed car imposes an opportunity cost upon the dealership, because sale of a repossessed vehicle takes the place of sale of another used car on which the dealer could realize a profit. Accordingly, argues respondent, the dealer should be entitled to realize a profit when it resells repossessed collateral.

Complaint counsel respond to this that the resale of repossessed collateral is nothing more than a debt collection activity. When a car is sold for the first time, the sales price includes a profit for the dealer, and this profit includes within it some allowance for the possibility that the debtor may default. When default occurs, resale of the repossessed collateral allows the dealer to realize his original profit, through recovery of the entire contract balance. Since the dealer's profit on each sale should already include an allowance for all costs incident to the sale (including debt collection costs) it would be unfair to permit the dealer to recover an additional profit, or share of the overhead, upon the repossession sale. No one, in complaint counsel's view, would suggest that when a finance company sues to collect an unpaid debt, or when an automobile dealer sues to collect an unpaid debt, the plaintiffs are entitled to charge the debtor for a ratable share of company overhead attributable to the time required by company employees to prepare for the lawsuit. Nor would it be suggested that the finance company or car dealer should be entitled to make a *profit* upon a suit for an unpaid debt, above and beyond the profit already included within the sales price or finance charge. The confusion in the case of the repossession transaction, in complaint counsel's view, results because the debt collection activity (i.e. the repossession sale) takes the same form as the principal line of business of the secured party (i.e. selling cars) and this induces people to analyze the repossession transaction as being simply another sales transaction by the dealer, rather than one means of collecting a debt.

Deciding between these two positions depends very much upon one's view of what the goals of secured transactions law should be, the relative importance to be attributed to each of these goals, and how these goals can best be achieved.

Among the principal goals that have been suggested in this proceeding are the following:

(1) Establishment of a clear, readily administered mechanism for preserving the debtor's equity in repossessed collateral; and

(2) Deterring defaults.

Preservation of the debtor's equity in repossessed collateral is clearly a goal of Article 9. The law seeks to achieve this by requiring the secured party to act as a fiduciary for the debtor, to seek to obtain the best possible price for the collateral at a commercially reasonable sale, and to account to the debtor for any surplus.

Respondent argues that in pursuing this goal the law has gone too far, because when disposition occurs at retail, the debtor receives a windfall. This occurs because the value of his automobile is augmented by being resold by a dealer, but the amount of this augmentation cannot be entirely recovered. While the law does allow all recovery of out-of-pocket expenses, as well as direct sales commissions, it does not allow for recovery of such overhead items as general firm advertising, plant maintenance, and the like, all of which go into establishing a dealer's image and reputation and determine the price that it can charge for its cars. Giving the defaulting consumer a windfall, argues respondent, does more than is necessary to preserve his equity, and at the same time, disserves the goal of discouraging defaults, by creating an *incentive* for the debtor to default, rather than resell the car himself, if he desires or is forced to be rid of it.

This argument is certainly correct up to a point. That is, it seems quite plausible that in many cases, taking a given car, in a given state of repair, Francis Ford will be able to realize a higher price on that car than could the individual owner if he sought to sell it for himself, even allowing for the salesman's commission. The higher price may result in part from Francis Ford's reputation and good will, which an individual consumer would not have.*

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*We have not included the dealer's warranty as a source of price because the law would not require the secured party to count as part of the proceeds from a repossession resale the price of any warranty separately extended by the dealer of the car. However, to the extent that an implied warranty might arise upon the resale of a used car, the greater likelihood that it would be enforceable against a dealer as opposed to an individual consumer-seller might result in the dealer's ability to command a higher price.

This observation, however, does not end the argument, for in any individual case it may be true that a car's value is not augmented by dealership good will, and, even where it is so augmented, the amount of the augmentation must be measurable, in fairness to the debtor. The position of respondent's experts appears to be that *any* increase in value of collateral beyond its "wholesale value" should be attributed to the dealer's efforts, and so should be recoverable by the dealer. (*E.g.*, Tr. 1645) *By definition* this position would eliminate the possibility of any surplus resulting from a retail resale, in obvious mockery of both the law and the facts.**

If one attempts actually to calculate properly attributable overhead, the extreme difficulty of the task becomes apparent. If the burden is placed on the consumer to disprove the validity of allocations for overhead, the opportunity for creditor overreaching is extreme. If the burden is placed upon the creditor to justify his overhead allocations, the practical effect is likely to be that the creditor finds it is cheaper to pay a surplus. *

** As we note in the text, when Francis Ford did attempt to compute surpluses by charging for various overhead expenses, it still realized surpluses. (P. 5, n.5) And as respondent's experts acknowledge, a consumer could resell his car for retail book value. (Tr. 1609) Respondent suggests that most debtors do attempt to resell their automobiles before repossession, giving them up only if they are unable to achieve a price in excess of the debt. The record suggests that this is true for some debtors, untrue for others. Several considerations suggest that a debtor's own pre-repossession efforts should not be made the sole test of whether or not he is entitled to a surplus, among them being the ignorance of some debtors as to what their car may be worth and imperfections in the want-ad market for used cars that may preclude even a knowledgeable debtor from realizing fair market value.

* Proper attribution of overhead expenses so as to preserve debtor's equity requires allocation to each repossessed vehicle of only those items of overhead that contribute to the increase in value of the collateral. In this regard, it is unclear how such fixed expenses as rent, lights, water, heat, telephone, general firm advertising, and the like should fairly be divided. Should the division be proportionate to the size of the car, or its selling price? Should the division be

For these reasons then, the rule disallowing recovery by the creditor of general overhead may be the most *practical* way to assure preservation of the debtor's equity. Though it may under some circumstances overstate that equity, it also ensures that that equity will be preserved against the encroachments that would result if essentially non-measurable costs could be charged against the debtor.

Without necessarily questioning that this view has some validity, respondent suggests that it results in a gross anomaly, because debtors whose cars are repossessed by a finance company not party to a recourse financing agreement receive only the benefits of a wholesale disposition of the collateral, while customers of Francis Ford and other dealers that engage in recourse financing receive the benefits of retail disposition. Francis then points to testimony of witnesses to the effect that the surpluses on wholesaled collateral appear with the frequency of Halley's Comet to show the incongruity.

The comparison with wholesale disposition may, however, be more a reflection upon the insufficiency of that method of resale than it is upon the excessive generosity of retail disposal of repossessed collateral. One study, for example, found that wholesale dispositions of repossessed cars yielded on average prices that were only 51% of retail *Redbook* value, and only 71% of *wholesale Redbook* value (compared to 93% of wholesale *Redbook* value obtained on a different group of unrepossessed used cars sold at wholesale auctions). Schuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 Stan. L. Rev. 20, 31 (1969).

In the case before us, the Kelley Bluebook *wholesale* value of a number of the cars repossessed by Francis Ford's lenders exceeded the amount of the payoff. Presumably, Francis Ford, which claims to have determined repossessions by comparing

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proportionate to the length of time the car spends on the lot? Does a car's value bear any relationship to the time it spends on the dealership lot, or is the relationship an inverse one? Failure to resolve these and other questions would inevitably result in some debtors being deprived of equity.

wholesale price with payoff, did not pay surpluses on any of these cars because its used car manager concluded that they were in sufficiently poor condition so as not to be worth guide book values. This, indeed, reflects the view of some witnesses in this proceeding, to the effect that repossessed vehicles are generally in poorer condition than other used cars, and any car owner who surrenders his car does so because he knows that he could not resell it himself for the contract balance. (*See* p. 3, n.____, *supra*)*

In any event, while there is no doubt that the law creates certain disparities among debtors, because some receive the benefit of wholesale and some of retail dispositions of their cars, it does not follow that this disparity results in a windfall for the beneficiaries of retail disposition. It may rather be that such debtors receive roughly what they should, while beneficiaries of wholesale disposition are regularly deprived of equity because of imperfections in the wholesale market, or in the types of wholesale disposition regularly employed.

Finally, we may return to the goal of default deterrence, which should underlie any scheme for regulating relations of debtors and creditors. We have observed that a strong argument for disallowing generalized overhead expenses is that it provides a precise way of measuring debtor's equity, and avoids its unfair extinguishment by means of unjustified allocations of overhead. Does this, however, encourage defaults, or fail to discourage defaults, by sparing debtors certain costs associated with the failure to pay?

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* A great many rationalizations of this sort have been presented by witnesses in this proceeding to show why, notwithstanding the elaborate provisions made for them in Article 9, surpluses will rarely or never result. There are, of course, other reasons why surpluses might now occur more frequently than they have in the past, for example, sustained high inflation and major changes in the availability of gasoline and the design of automobiles, which have had the cumulative effect of maintaining the value of at least some kinds of used cars.

One cardinal rule of cost allocation is that costs should be borne by the parties best able to avoid them. In the credit context, however, the application of this formula is unclear, because a great many defaults cannot be prevented by the defaulters. Some debtors are deadbeats, or become voluntarily and unjustifiably overextended, leading to default. Many others, however, default for reasons essentially beyond their control, in particular, illness, divorce, or loss of employment. Bending over backwards to ensure that these debtors bear every conceivable cost associated with their defaults is, therefore, unlikely to contribute substantially to deterring them.

The foregoing is not to say that debtors should not be made to pay the readily measurable costs associated with default, and indeed, this is the precise effect of the law, which allows the creditor to recover all out-of-pocket expenses, including towing, reconditioning costs, and the like. This alone is likely to act as a substantial deterrent to default (to the extent it is deterrable) because as soon as the car is repossessed the debtor's equity in it is immediately reduced by all costs directly related to the repossession (such as towing) which could have been avoided if default had not occurred. The question is simply how certain unmeasurable costs (i.e. overhead) should be divided. Should the law bend over backwards to ensure that no windfall is given to the debtor, so as to discourage defaults, even at the risk that the debtor may be deprived of his equity in the collateral? Or should the law bend over backwards to ensure that no extinction of the debtor's equity occurs, so as not to further penalize the debtor for an occurrence that in many cases he is powerless to prevent, even though this may mean that the debtor is given a slight windfall? *

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* We have not discussed this situation from the standpoint of the *creditor's* equities because, within the parameters of the problem being discussed (whether to allow him to charge overhead) the creditor can be somewhat indifferent. Thus, if repossession is regarded as debt collection, the creditor can budget for it in the price of his cars, as he would for any other debt collection activities or similar costs of doing business. The real tradeoffs in cost come between defaulters and all other customers of the seller. Thus, allowing the creditor to

The allocation made by the Uniform Commercial Code is certainly one eminently reasonable way of striking a balance between two important policy goals. Defaults must be deterred, but debtors who do default should not be deprived of the built-up value of the collateral. No formula can do this perfectly in the real world, but the one recited in the text of this opinion, and required by the Uniform Commercial Code, does so in a sound, if not unchallengable, fashion.

SYNOPSIS OF DETERMINATIONS FOR 15 U.S.C. § 45(m)(1)(B) FORD MOTOR COMPANY ET AL., DOCKET NO. 9073.

It is unfair and unlawful under Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) for a party to engage in the following practices:

(A) Failing to account for and pay a defaulting customer within a reasonable time after repossession and resale (or lease) of the collateral, any surplus to which the customer is entitled under state law, and which the party is obliged to pay the customer under state law.

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recover for general overhead ensures that all costs of default are borne by the debtor, at the expense of depriving the debtor of some equity. Disallowing overhead may mean that some costs of default are borne by all customers of the seller, to ensure that defaulters do not suffer the misfortune of being deprived of their equity.

It should also be recognized that from the standpoint of imposing costs on the parties best able to avoid them, *dividing* costs of default between creditor and debtor may be sound policy, by giving creditors as well an incentive to screen credit risks carefully. Of course, we recognize that the costs involved here (i.e. overhead allocable to repossessions) are quite small compared to other costs of default imposed on creditors—i.e. uncollectible contract balances or deficiencies.

(B) Failing to credit to the defaulting customer, for purposes of determining any surplus or deficiency:

1. The full amount of unearned finance charges, including the proportionate shares of the dealer and the financing institution;

2. The full amount of any unearned insurance premiums, including but not limited to the dealer's (sales commission) share of premiums attributable to the remaining term of the insurance.

3. The full amount of proceeds received from or credited by an insurance firm or other source as compensation for damage to the repossessed collateral, except where such proceeds are offset by actual repair of that damage.

4. The full amount of proceeds realized upon an actual sale (or lease) of the repossessed collateral to an independent third party, in good faith, for the best possible price.

5. The underallowance realized on any property taken in trade upon the sale (or lease) of the repossessed collateral; i.e., the amount by which the established wholesale value of such trade-in property exceeds the trade-in allowance given therefor.

(C) Failing to exclude, for purposes of calculating the amount of any surplus or deficiency:

1. All amounts for repair and reconditioning above and beyond the direct (out-of-pocket) expense incurred by a secured party in or for performance of such repair or reconditioning of the particular repossessed collateral in preparing it for sale (or lease).

2. All amounts paid upon the sale (or lease) of the repossessed collateral as commissions for the sale of insurance and financing, and all amounts paid to supervisorial and administrative/support personnel without regard to whether they participated directly in the process of promoting that particular sale (or lease).

3. All amounts for advertising other than a proportionate share of expenditures for advertisements which specifically mention the particular collateral.

4. All indirect or fixed expenses (overhead), including but not limited to costs of real property, rent, depreciation, capital, supervision, administration, insurance and other expenses which are not directly increased as a result of the repossession, storing, reconditioning or reselling (or leasing) of the particular collateral.

5. All costs and expenses other than unreimbursed out-of-pocket expenses actually incurred as a direct result of the repossession, storing or sale (or lease) of the particular collateral, or of preparing it for such sale or lease.

6. Any amount of overallowance greater than the lawful excess of trade-in allowance given upon the sale (or lease) of the repossessed collateral, over the established wholesale value of property taken in trade thereon.

(D) Taking any action to obtain or to attempt to obtain or bring about a waiver of a customer's right to a refund of surplus, except in the precise manner and under the precise circumstances contemplated by the applicable state law version of Section 9-505 of the Uniform Commercial Code. Under Section 9-505 a waiver of a customer's right to a surplus may not be sought unless the secured party intends to retain the collateral for its own use for the immediate future rather than to resell the collateral in the ordinary course of business.

APPENDIX E

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9073

In the matter of

FORD MOTOR COMPANY,
FORD MOTOR CREDIT COMPANY,
and FRANCIS FORD, INC.,
corporations.

COMMISSIONERS:

MICHAEL PERTSCHUK, Chairman
PAUL RAND DIXON
DAVID A. CLANTON
ROBERT PITOFSKY

FINAL ORDER

This matter has been heard by the Commission upon the cross-appeals of complaint counsel and respondent's counsel from the initial decision and upon briefs and oral argument in support of and in opposition to each appeal. The Commission, for the reasons stated in the accompanying Opinion, has for the most part, denied the appeals of both sides. Therefore,

IT IS ORDERED that the initial decision of the administrative law judge, pages 1-45, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except for:

> Finding No. 72, first sentence; Finding No. 73, first 18 words; Page 38, paragraph 4, second sentence; Page 38, paragraph 5; Page 38, paragraph 6, last 25 words; Page 39; Page 40 through first full Paragraph; Page 40, numbered paragraph "7".

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following Order to Cease and Desist be entered:

ORDER

I. IT IS ORDERED that for purposes of this Order the following definitions shall apply:

A. "Respondent" means Francis Ford, Inc., a corporation, and its successors and assigns. It does not include Ford Motor Company or Ford Motor Credit Company.

B. "Vehicle" means an automobile or truck and any and all parts, accessories, and appurtenances repossessed therewith. A van is deemed a "truck."

C. "Adjusted balance" means the unpaid balance as of the date of repossession (1) less applicable finance charge and insurance premium rebates, (2) less all amounts received for collision insurance claim payments except those for which the corresponding vehicle damage is repaired, and (3) plus other charges authorized by contract or law and actually assessed prior to repossession.

D. "Proceeds" means whatever is received by respondent upon its disposition of a repossessed vehicle, excluding finance charges, sales taxes, separately priced warranties and service contracts insofar as the charges therefor are itemized in documents provided at that time to the party to whom disposition is made. Any underallowance realized on the disposition shall be included. The amount of any lawful overallowance given on such a disposition may be deducted if (1) the amount so deducted was determined at the time of the disposition and is no greater than the excess of the trade-in allowance over the wholesale value of the vehicle taken in trade on the repossessed vehicle as that value is shown in a current recognized guidebook used in the area, (2) overallowances are given and contemporaneously recorded in the normal course of respondent's sales or leases of nonrepossessed vehicles, and (3) correctly determined underallowances are included in the proceeds of other repossessed vehicle dispositions wherever applicable.

E. "Allowable expenses" means actual out-of-pocket expenses incurred by respondent as a direct result of a repossession. The expenses must be reasonable and result directly from the repossessing, holding, preparing for sale or reselling of the vehicle, and be not otherwise reimbursed to respondent nor prohibited by contract. They are limited to the following charges (insofar as permitted by state law) and no others:

1. amounts paid to persons who are not employees of respondent nor of a financing institution which financed the prior sale, for repossessing, towing or transporting the vehicle;
2. filing fees, court costs, cost of bonds, fees and expenses paid to a sheriff or similar officer, and fees and expenses paid to an attorney who is not an employee of respondent nor of the financing institution, for obtaining possession of or title to the vehicle;
3. fees paid to others to register or obtain title to or legally required inspection of the vehicle;
4. amounts paid to others for storage (excluding charges for storage at facilities owned or operated by respondent);
5. labor and associated parts and supplies furnished by respondent for the repair or reconditioning of the vehicle in preparation for resale, computed at the following cost rates:

a. The cost rate for labor of mechanical technicians employed in respondent's retail repair shop (for mechanical work) or for body-paint technicians employed in respondent's retail body shop (for body work) shall be based on actual time spent on the vehicle and may not exceed the greater of:

(i) the sum of respondent's average hourly base rate for that category of technicians (mechanical, body-paint, or heavy truck) plus 20 percent of that average hourly base rate to cover fringe benefits, provided that such data is reflected in a file identifiable with that vehicle, or

(ii) the sum of the average hourly base rate for that category of technicians plus the average annual hourly cost for voluntary and legislated fringe benefits for that category of technicians computed in accordance with the "long form" Warranty Labor Rate Request (Ford Form FCS 9716, April 1978) (Attachment A hereto), provided that such data is reflected in a file identifiable with that vehicle;

b. The cost rate for labor for other reconditioning, clean-up and preparation work performed by employees of respondent shall be based on actual time spent on the vehicle and may not exceed the base hourly wage rate for the employees involved plus 20 percent of their base hourly wage rate to cover fringe benefits, provided that such data is reflected in a file identifiable with that vehicle;

c. The cost rate for parts shall not exceed respondent's cost for the parts used as listed in the current manufacturer's catalogue.

Provided, however, that if the amount of respondent's payoff to the financing institution is reduced because of insured collision damage or if respondent receives any payment for collision damage or warranty work, then the corresponding vehicle work performed shall not be an allowable expense, but if a payoff adjustment is for uninsured collision damage, the corresponding vehicle work performed shall be deemed an allowable expense.

6. amounts paid to others for labor and associated parts and supplies purchased for the repair or reconditioning of the vehicle in preparation for resale;

7. sales commissions paid for actual participation in the sale of the particular vehicle, computed at a rate no higher than for a similar, non-repossessed

vehicle, but excluding all portions of commissions attributable to the selling of service contracts, warranties, financing or insurance;

8. a proportionate share of expenditures for advertisements which specifically mention the particular vehicle;
9. fees and expenses paid to others for auctioning the vehicle;
10. expenses for telephone calls and postage incurred in arranging for the repossession, holding, transportation, reconditioning or resale of the vehicle; and
11. amounts respondent was contractually required to pay and did pay to reimburse the financing institution to which payoff was made, for expenses such as repossession of the vehicle or allowance for uninsured collision damage, if such expenses were not included in the payoff.

F. "Surplus" means the excess of (1) the proceeds plus any applicable rebates or credits not deducted by the financing institution, over (2) the adjusted balance, allowable expenses, and amounts paid to discharge any other security interest provided for by law. A negative (minus) amount produced by such calculation is referred to herein as a "deficiency."

G. "Diligent efforts" means that in any case where the full surplus or disclosure is not actually received by the defaulting customer within the specified time frame, respondent's efforts to effectuate such payment and/or disclosure shall meet at least the following criteria: The payment and/or disclosure are to be sent by regular mail within the specified time frame to the customer's last residence address known to respondent or available from the financing institution, with the face of the envelope (1) showing respondent's name and return address and (2) indicating that it is to be forwarded and that if there is no forwarding address it is to be returned to the sender. If the envelope is returned undelivered, the payment and/or disclosure are to be sent to the most recent of the following known addresses: the last employment address known to respondent

or available from the financing institution; the address provided by the military locator service (if applicable); or the address of a co-signer, relative or other person through whom the customer may be reached. If an insurance rebate or other credit is received after a surplus payment has been sent, a further payment in the additional amoun is to be sent in the same manner within 45 days of respondent's disposition of the vehicle or within 10 days of receiving the rebate, whichever is later. If such a rebate is received after a prior computation had indicated there was no surplus, a second computation is to be made and any surplus sent in the same manner and within the same time limit.

H. "Best possible price" means that respondent will exercise every reasonable effort to market the vehicle for the highest possible net return for the debtor's account (in terms of proceeds less allowable expenses). For each disposition of a repossessed vehicle by respondent other than by retail sale, respondent shall retain contemporaneous documentation showing with specificity that such manner of disposition could reasonably be expected to produce a greater net return for the debtor's account than would retail sale.

II. IT IS FURTHER ORDERED that respondent and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the extension and enforcement of motor vehicle retail credit obligations, and in connection with the disposition of repossessed motor vehicles, in or affecting commerce (as "commerce" is defined in the Federal Trade Commission Act, as amended), do forthwith cease and desist from:

A. Failing to determine the following information and to disclose or make diligent efforts to disclose such information to the defaulting customer in substantially the manner indicated on Attachment B hereto, "Resale of a Repossessed Vehicle," within forty-five (45) days of respondent's disposition of a repossessed vehicle:

1. the date, place and manner of disposition;

2. the adjusted balance, itemized to reflect the unpaid balance and all rebates and other adjustments thereto;
3. the proceeds and allowable expenses, itemized and excluding all expenses other than allowable expenses;
4. the amount of surplus or deficiency.

Provided that such disclosures need not be made where respondent can establish that no surplus resulted from the disposition, unless an attempt is made to collect a deficiency from the defaulting customer or from his or her successors or assigns.

B. Failing to pay or make diligent efforts to pay each surplus in full to the defaulting customer or to his or her successors or assigns, accompanied by disclosures as required by Paragraph II A above, within forty-five (45) days of respondent's disposition of the vehicle.

C. Failing to dispose of any repossessed vehicle in a manner designed to obtain the best possible price.

D. Failing to apply promptly for any rebate or credit owing to the defaulting customer's account.

E. Taking any action to obtain or to attempt to obtain or bring about a waiver of a customer's right to a refund of surplus, except in the precise manner and under the precise circumstances contemplated by the applicable state law version of Section 9-505 of the Uniform Commercial Code. Under Section 9-505 a waiver of a customer's right to a surplus may not be sought unless respondent intends to retain the collateral for its own use for the immediate future rather than to resell the collateral in the ordinary course of business. If a waiver is sought, respondent shall not represent that by proposing the waiver it proposes to forego its right to a deficiency judgment, unless it intends to seek such a judgment should the waiver not be given.

F. Collecting or attempting to collect from a defaulting customer or from his or her successors or assigns, by any

means, a deficiency in excess of either (1) the amount permissible under applicable state or federal law, or (2) the amount determined in accordance with the definitions set forth in Part I of this Order,

PROVIDED that no customer's waiver of rights or failure to object to any secured party's proposal to retain the repossessed vehicle, unless procured in exact conformity with Paragraph II E, shall limit respondent's obligations under this Order to account for and pay any surplus.

III. IT IS FURTHER ORDERED that respondent:

A. Proceed immediately to identify, back to February 10, 1976, the existence and amount of each unpaid surplus arising from respondent's dispositions of repossessed vehicles in which respondent held or acquired a security interest or the rights or duties of a secured party at or after default. This identification shall be completed within ninety (90) days of the effective date of this Order.

B. For each defaulting customer entitled to a surplus identified under Paragraph III A above but previously reported to a credit reporting agency by respondent or a representative of respondent as owing a deficiency, advise the credit reporting agency of the correct facts within 120 days of the effective date of this Order.

C. Endeavor in good faith, through contacts with credit reporting agencies, state licensing and employment offices, and other reasonably accessible research sources and records (including published directories), to locate each defaulting customer entitled to a surplus identified under Paragraph III A above, or the successors or assigns of such customers with respect to their surplus rights.

D. Disclose or make diligent efforts to disclose in writing to each defaulting customer, successor or assign located pursuant to Paragraph III C above, within 150 days of the effective date of this Order: (1) the same items of information specified in Paragraph II A of this Order, and (2) in clear lay language, in substantially the form indicated on Attachment C hereto, "Notification Letter," the rights and remedies of such customer, successor or assign under applicable state law and under this Order.

IV. IT IS FURTHER ORDERED that respondent maintain the following records relating to each repossessed vehicle returned to respondent:

A. Records of payment and of efforts to disclose and pay surpluses and locate defaulting customers entitled thereto under Parts II and III of this Order, including but not limited to canceled checks, returned envelopes and copies of disclosures and other communications (showing dates and manner of mailing).

B. Business records underlying each item specified in Paragraph II A of this Order, including but not limited to payroll records and warranty labor rate forms pertinent to determinations of "cost rates" of labor under Paragraph I E 5 of this Order.

Each such record shall be retained by respondent for at least three years and shall be available for inspection and copying by authorized representatives of the Commission.

V. IT IS FURTHER ORDERED that respondent shall forthwith deliver a copy of this Order to each of its operating departments, divisions and related business enterprises, and applicable provisions thereof to all present and future personnel of respondent engaged in the sale or offering for sale of motor vehicles and/or in the consummation of any extension of consumer credit or in bookkeeping, accounting or recordkeeping for respondent; and that respondent secure from each such person a signed statement acknowledging receipt of the Order or provisions.

VI. IT IS FURTHER ORDERED that:

A. Respondent shall, within sixty (60) days after the effective date of this Order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this Order.

B. Respondent shall, within one hundred eighty (180) days after the effective date of this Order, submit to the Commission a report demonstrating respondent's compliance with Part III of this Order, including the number of repossessions and surpluses identified, together with a detailed description of respondent's manner of identifying and attempt-

ing to disclose such surpluses and of locating and attempting to locate defaulting customers entitled thereto.

C. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation and dissolution of subsidiaries, or any other corporate change which may affect compliance obligations arising out of this Order.

By the Commission.

SEAL

Carol M. Thomas
Secretary

ISSUED: September 21, 1979

Warranty Labor Rate Request – Standard Form

WARRANTY LABOR RATE POLICY

100% of the dealer's hourly cost for the following fringe benefits for those productive technicians.

- Paid Vacations
- Pay in Lieu of Vacation
- Holiday Pay
- Sick Pay
- Dealer's Portion of:
  - Hospital/Dental Ins.
  - Retirement/Pension Plan
  - Uniforms and Laundry
  - Group Life Insurance
- F.I.C.A. (Social Security)
- Federal Unemployment Compensation
- State Unemployment Compensation
- Worker's Compensation Insurance
- Other Special Legislated Benefits
- Fringe benefits that are union negotiated and part of a dealer's local union contract, except fringe benefits relating to established flat rate times issued by Ford.

Items not recognized as allowable fringe benefits include technician training expense and any dealer incentive program for service personnel.

67a

INSTRUCTIONS FOR COMPLETING WAGE DATA AND FRINGE BENEFIT WORK SHEETS – Pages 2 and 3

ENTER THE FOLLOWING

COLUMN A — General pay classification of each technician using appropriate code (M-Mechanical, BP-Body-Paint and HT-Heavy Truck). If calculating separate rates for each group, leave at least two lines between each group for group totals.

COLUMN B — Productive line technicians including new car conditioning employees. Do not include supervision, service writers, apprentices, dispatchers, porters, lube or wash rack employees.

COLUMN C — Technicians' Social Security Number.

COLUMN D — Date technician employed at your dealership.

COLUMN E — Technicians' hourly base pay rate. If paid on a percentage pay plan, enter his hourly rate based on the percentage split of your stated retail customer labor rate.

COLUMN F — Technicians' pay plan. (S-Salary, H-Hourly, FRH-Flat Rate Hourly, 50/50 Percentage Split, O-Other – Explain).

COLUMN G — Technicians' "Gross Earnings" during the last three calendar months.

COLUMN H — Actual hours the technician worked during the last three calendar months.

COLUMN I — Technicians' normal attendance hours in a work week.

COLUMN J — Number of days and the annual cost of vacation obligations your dealership incurs for the technicians. Include any pay in lieu of vacation.

COLUMN K — Number of days and annual cost to your dealership of those holidays recognized by your dealership.

COLUMN L — Number of sick days and the annual cost which your dealership pays to each technician. If covered by an insurance policy, show cost of insurance premium. If obligation is variable and based on actual sick days, use previous twelve months expense.

COLUMN M — Annual dealership cost of hospital and dental insurance premiums extended to each technician.

COLUMN N — Annual dealership cost of any life insurance program extended to each technician.

COLUMN O — Annual dealership cost of retirement/pension benefits extended to each technician. Include Profit Sharing Plans only if payable upon retirement and administered by a trustee.

COLUMN P — Annual dealership costs of uniforms or laundry service furnished each technician.

COLUMN Q — Annual dealership costs of any other applicable union contract or voluntary fringe benefits not previously listed. Attach supporting documents for any such costs.

COLUMN R — Total voluntary fringe benefit costs for each technician (Column J through Q).

COLUMN S — Annual dealership costs of F.I.C.A. (social security) paid for each technician. This is the dealership cost portion of U.S. Government Form 941, "Employer's Quarterly Federal Tax Return".

COLUMN T — Annual dealership costs of federal unemployment compensation paid for each technician as reported on U.S. Government Form 940, "Employer's Annual Federal Unemployment Tax Return".

COLUMN U — Annual dealership costs of state unemployment compensation paid for each technician as reported on the applicable state reporting form.

COLUMN V — Annual dealership costs of Workmen's Compensation insurance paid for each technician.

COLUMN W — Annual dealership costs of any other legislated fringe benefits paid for each technician that results in direct costs to your dealership (i.e., state disability tax is applicable in selected states).

COLUMN X — Total legislated fringe benefit costs for each technician (Column S through W).

EXAMPLE COMPUTATION FOR LINE 8 OF BASIC CALCULATION

Average Normal Work Hours Per Week	40
Multiplied by 52 Weeks	2080
Less Legal Holidays Multiplied by 8 Hours	48
Equals Average Normal Work Hours Per Year	2032

Page 2

WAGE DATA

FOLLOW INSTRUCTIONS LISTED ON PAGE 1 IN COMPLETING THIS FORM

FRINGE BENEFIT DATA

LIST DEALER PORTION OF COST FOR VOLUNTARY FRINGE BENEFITS (Round to Nearest ¢)

FEDERAL AND STATE LEGISLATED FRINGE (Round to Nearest Dollar)

Page 3

A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X
Work Class	Technician's Name	Social Security Number	Base Work Hours	Hourly Base Pay Rate	Pay Rate	Hours Overtime Over 8 Hrs.	Actual Hours Worked (List 8 Hrs.)	Normal Work Hours Per Week	VACATION		HOLIDAY		SICK PAY ACT. DAYS PAID		Health/ Dental/ Insurance Annual Cost	Life Insurance Annual Cost	Retirement Pension Annual Cost	Apprentice Training Annual Cost	Other (Specify Below)	Total Annual Fringe Cost (J thru N)	F.I.C.A. (Social Security) Annual Cost	Federal Unemployment Comp. Annual Cost	State Unemployment Comp. Annual Cost	Worker's Comp. Insurance Annual Cost	Other (Specify Below)	Total Legislated Fringe Cost (S thru W)
									No. Days	Annual Cost	No. Days	Annual Cost	No. Days	Annual Cost												
1																									
2																									
3																									
4																									
5																									
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18																									
19																									
20																									

DEALER WORK TABLE

BASIC CALCULATION:

	MECHANICAL	BODY-PAINT	HEAVY TRUCK
1. Number of Technicians (Total of Column B)*			
2. Total Hourly Base Pay Rate (Total of Column E)*	$	$	$
3. Technicians' Average Work Hours per Week (Total of Column I divided by Line 1)*			
4. Average Annual Voluntary Fringe (Total of Column R divided by Line 1)*	$	$	$
5. Average Annual Legislated Fringe (Total of Column X divided by Line 1)*	$	$	$
7. Technicians' Average Work Hours per Year (See Example on Page 1)**			

*By type of work

ATTACHMENT B

RESALE OF A REPOSSESSED VEHICLE

ORIGINAL CUSTOMER

Name: _____
Address: _____
Zip _____

Second address (if available): _____
City/state _____
Zip _____

RESALE CUSTOMER

Name: _____
Address: _____
City/State: _____
Zip _____
Date resold: _____
Place of sale: _____
Manner of sale: _____

FINANCING INSTITUTION DATA

Name: _____
Location: _____

LOAN PAY-OFF

Amount: $ _____ Check No. _____

SURPLUS OR (DEFICIENCY) ON RESALE OF A REPOSSESSED VEHICLE

			Amount	Amount
1.	Selling Price	Selling Price	$	
		Trade-in adjustment: Overallowance	$( )	
		Underallowance	$	$
2.	Loan Pay-Off	Loan Pay-Off to Financial Institution	$	
		Less: Insurance Premium Rebates Received	$( )	
		Less: Collision Insurance Claim Pmt. Rcv'd	$( )	$

70a

3. Item 1, Less Item 2 - No further calculation is required if this figure is negative unless a deficiency is sought. $____

4. Allowable Expenses

a. Dealer repo exp.	$ ____	f. Reconditioning	$ ____		
b. Legal costs	$ ____	(By others)	$ ____		
c. Title & reg. fees	$ ____	g. Sales Comm.	$ ____		
d. Storage	$ ____	h. Advertising	$ ____		
e. Reconditioning		i. Auction fees & expenses	$ ____		
(By Dealer)		j. Postage/Tel.	$ ____		
Rate ___ Hours ___	$ ____	Total	$ ____		$____
Rate ___ Hours ___	$ ____				
Rate ___ Hours ___	$ ____				
Parts	$ ____				

5. Item 3 less Item 4 - No further calculation is required if this figure is negative unless a deficiency is sought. $____

6. Less Reimbursement to Financing Institution for Repossession Expenses $____

7. Less Other Liens $____

8. Surplus owing to original customer - TO BE REFUNDED $____

CUSTOMER REFUND Amt. $ Ck. No. Date

Vehicle Description	Year	Make	Model	Stock No.	Serial No.

[ ] No expenses other than allowable expenses have been deducted in computing a surplus or deficiency.

CERTIFICATION

I hereby certify that (1) the vehicle was sold in a commercially reasonable fashion and (2) the above computation of surplus or deficiency on the sale of a repossessed vehicle is accurate

and (3) any surplus indicated herein has been paid (unless reasonable efforts to locate the original customer have proven unsuccessful).

Dealership Name

Signature

Title

City

State

Dealer Number

ATTACHMENT C

Notification Letter

Dear _____:

On *(insert date of resale)* we resold the *(insert year/make/model of vehicle)* that was repossessed from you on or about *(insert date of repossession)*.

The resale price of your vehicle minus the amount of your debt and our expenses left a balance of *(insert amount of surplus)*. The enclosed form shows how we calculated it. UNDER STATE LAW, WE OWE THIS MONEY TO YOU, and you may sue us for it if we do not pay it to you. You may also have a right under state law to sue us for penalties for our failure to notify you and repay the money we owe you in timely fashion.

SIGNED

_____

(Francis Ford, Inc.)

Filed: January 4, 1979

APPENDIX F

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9073

In the matter of

FORD MOTOR COMPANY,
FORD MOTOR CREDIT COMPANY,
and FRANCIS FORD, INC.,
corporations.

INITIAL DECISION

LEWIS F. PARKER
Administrative Law Judge

TABLE OF CONTENTS

Page

I. PRELIMINARY STATEMENT .....

A. History Of The Case .....
B. Allegations Of The Complaint .....

II. FINDINGS OF FACT .....

A. Francis Ford's Business .....
B. Commerce .....
C. Francis Ford's Retail Installment Contracts ...
D. Repurchase Agreements .....
E. The Benefits Of Repurchase Financing .....
F. Repossession .....

1. Calculating The Payoff .....

a. Finance Charges .....
b. Insurance .....

2. Resale Of The Repossessed Vehicle .....

a. Francis Ford's Practice .....
b. Wholesale Value vs. Resale Price ...

G. Allowable Expenses .....

1. Overhead .....
2. Over And Underallowances .....
3. Other Expenses .....
4. Surpluses Realized By Francis Ford On Sales Of Repossessed Vehicles .....

H. The Typical Defaulting Customer .....

III. CONCLUSIONS OF LAW .....

A. The FTC Act And The Definition Of "Unfair" .
B. The UCC And Oregon Law .....
C. Francis Ford Has Realized, And Has Not Paid, UCC Surpluses .....

1. Introduction .....
2. Actual Sale vs. Wholesale Appraisal .....
3. Retail vs. Wholesale Disposition And The "Best Possible Price" .....
4. Overhead Is Not An Allowable Expense ..

Contents—Continued Page

D. Are Francis Ford's Acts Deceptive, Immoral, Fraudulent, Or Injurious To Defaulting Customers? .....
E. Summary .....
F. Description Of The Order .....

1. Justification .....
2. Definitions .....
3. Substantive Provisions .....

ORDER .....

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9073

In the matter of

FORD MOTOR COMPANY,
FORD MOTOR CREDIT COMPANY,
and FRANCIS FORD, INC.,
corporations.

INITIAL DECISION

LEWIS F. PARKER, Administrative Law Judge

BRUCE D. CARTER, ESQ.,
DEAN A. FOURNIER, ESQ.,
DAVID R. PENDER, ESQ.,
SEATTLE REGIONAL OFFICE
FEDERAL TRADE COMMISSION,
Counsel Supporting the Complaint.

MICHAEL J. ESLER, ESQ.,
HAESSLER, STAMER, TILBURY & ESLER,
PORTLAND, OREGON,
Counsel for Francis Ford, Inc.

I. PRELIMINARY STATEMENT

A. History Of The Case

This case began on February 10, 1976, when the Commission issued a complaint charging Ford Motor Company ("Ford"), Ford Motor Credit Company ("Ford Credit"), and Francis, Ford, Inc. ("Francis Ford") with violations of Section 5 of the Federal Trade Commission Act ("FTC Act").

On March 24, 1976, Francis Ford filed its answer, admitting certain allegations of the complaint, denying others and assert-

ing six defenses. Prehearing conferences were held on April 13, 1976 and on February 3 and July 22, 1977. Complaint counsel filed their witness and document lists and trial brief on December 5, 1977. On March 17, 1978, this case was withdrawn from adjudication as to Ford and Ford Credit for purposes of considering a proposed consent agreement executed by these respondents and complaint counsel. This agreement was subsequently placed on the public record for comment.

Hearings with respect to Francis Ford were held from March 21-28, 1978 in Seattle, Washington. On June 26 and 27, 1978, Francis Ford filed a trial brief and list of witnesses, and its exhibit list was filed on July 10, 1978. Francis Ford presented its defense from July 24-28, 1978 in Seattle. The final record consists of 2,166 pages of testimony and argument and almost a thousand exhibits.

The record in this case was closed on September 1, 1978. Complaint counsel and Francis Ford filed their proposed findings on October 13, 1978 and their replies on October 30, 1978. At my request the Commission granted me an extension of time to January 8, 1979 to file this initial decision.

B. Allegations Of The Complaint

The complaint alleges that Francis Ford, a Ford dealer, arranges the financing of its retail sales of motor vehicles through Ford Credit or other lenders. When Ford Credit finances a sale, it is alleged, it provides a retail installment contract form which names the customer as buyer and the dealer as seller and which states that the contract is to be assigned to Ford Credit for value, that the buyer is to be indebted to the dealer or its assignee and that the dealer or its assignee is to be a secured party holding a security interest in the vehicle.

The complaint further alleges that if the buyer defaults, Francis Ford has undertaken the obligation, either by express or implied representations in its retail installment contracts, to account to the defaulting buyer for any surplus arising from the resale of repossessed collateral; however, the complaint

states, despite the fact that the laws of most states (derived from Article Nine of the Uniform Commercial Code ("UCC")), require a secured party, after default and repossession of the collateral, to account for any surplus of proceeds* from the sale of the collateral, Francis Ford has, in a substantial number of instances, deprived defaulting buyers of substantial amounts of money which are rightfully theirs by:

(1) Failing to institute or follow correct procedures for determining the existence or amounts of surpluses realized from the sale of repossessed vehicles,

(2) Failing to disclose the existence of these surpluses to defaulting buyers, and

(3) Wrongfully retaining such surpluses in violation of the defaulting buyers' statutory and contractual rights.

Finally, the complaint alleges that repurchase dealers,** one of which is Francis Ford, have failed to inform defaulting buyers of facts necessary to their exercise of the right of redemption granted by state law, and that this failure to disclose material facts has the tendency and capacity to hinder defaulting buyers in exercising this right. This allegation was, however, withdrawn by complaint counsel at the beginning of the hearings.

The following findings of fact, conclusions of law and proposed order are based upon the record in this case and upon the proposed findings and replies of the parties. Any proposed findings not adopted herein in substance or verbatim are re-

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*Defined in the complaint as that sum which is "in excess of the amount needed to satisfy all secured indebtedness, reasonable expenses of retaking, holding, preparing for sale, selling, and the like, and allowable legal costs and fees." (Complaint, Par. Five)

**Dealers who, by contract, agree that Ford Credit and other lending institutions may return repossessed vehicles to them. The lending institutions then receive from these dealers a "payoff" which consists of the unpaid balance of the retail installment contract adjusted by certain charges and credits. The repurchase dealer then resells the vehicle to a third party. (Complaint, Par. Seven)

jected either because they are irrelevant or because they are not supported by the record.

II. FINDINGS OF FACT

A. Francis Ford's Business

1. Francis Ford is an Oregon corporation with its office and principal place of business at 509 S.E. Hawthorne Boulevard, Portland, Oregon (Ans. ¶ I).* It is one of more than 6,000 franchised Ford dealers. It sells new and used cars and trucks and operates parts and service departments. These separate operations are required of franchised dealers by Ford (Tr. 1239-41). Francis Ford's total sales exceeded $13 million during each of the years 1974 and 1975 (CX's 2321-22). Its pre-tax profits from all of its operations were $112,406.00, or .0085% of total sales in 1974 (CX 2321) and $18,934.00, or .0014% of total sales in 1975 (CX 2322).

2. Francis Ford is one of the two highest-volume Ford dealers in the Portland area (Tr. 157). It sells about 2,400 vehicles annually, most of which are sold to retail customers rather than to wholesale purchasers or "fleet" operators (CX's 2321-22; Tr. 177). Francis Ford maintains two lots for the retail sale of used vehicles to the public (CX 2358).

3. In calendar year 1975, Francis Ford sold 878 used cars and trucks at retail and 283 used cars and trucks at wholesale (CX 2322). In calendar year 1974, Francis Ford sold 1,093 used cars and trucks at retail and 403 used cars and trucks at wholesale (CX 2321).

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*Abbreviations used in this decision are:

CX—Commission exhibit.

RX—Respondent's exhibit.

Tr.—Transcript of testimony.

Ans.—Francis Ford's answer to the complaint.

Adm.—Pages 13-14 Francis Ford's response to complaint counsel's second and third requests for admissions dated March 13, 1973.

4. As of December 31, 1977, 588 retail installment contracts sold or assigned by Francis Ford to Ford Credit were outstanding, and they amounted to a total receiveable of approximately $1,868,000 (Tr. 38-39).

B. Commerce

5. All Ford Motor vehicles sold by Francis Ford are manufactured and assembled at plants located outside the State of Oregon. They are shipped to Francis Ford in response to orders placed by Francis Ford with Ford's office in Seattle, Washington (Tr. 472-73).

6. Portland, Oregon is situated adjacent to the Columbia River, the boundary between the States of Oregon and Washington. Portland is the hub of a retail trading zone which includes Clark and Skamania counties in southwestern Washington, and is a Standard Metropolitan Statistical Area which includes Clark County (Stipulation, Tr. 1011-13). Francis Ford advertises its new and used cars and trucks for sale in this market through broadcast (television and radio) and print media (CX's 3601-07, 3622-26, 3631-34C; Tr. 158-62, 175-76). Vancouver is the largest city in Clark County, Washington, and is located immediately across the Columbia River from Portland.

7. The normal dissemination areas of several of the Portland-based television channels and radio stations which carry Francis Ford advertising extend into the State of Washington, including metropolitan Vancouver (Tr. 160-62).

8. In 1975, Francis Ford spent $221,578 on advertising allocated as follows: $16,113 to institutional advertising and promotion, $145,060 to new car advertising, and $60,405 to used car advertising (CX 2322). In calendar year 1974, Francis Ford spent $197,622 on advertising, allocated as follows: $10,835 to institutional advertising and promotion, $146,343 to new car advertising, and $40,444 to used car advertising (CX 2321).

9. Francis Ford's advertising volume in the Portland *Oregonian* and *Oregon Journal* newspapers totaled approximately $134,000 in each of the years 1974 and 1975 (Adms. 10 &

11). The *Oregonian* and *Journal* have substantial interstate circulation. Over 16,000 copies of the daily edition of the *Oregonian*, 4,800 of the daily edition of the *Journal*, and 33,000 of the *Oregonian* Sunday edition are distributed outside the State of Oregon. Most of this out-of-state circulation is in the State of Washington, about half of it in Clark County (Stipulation, Tr. 1011-13). Francis Ford also advertises occasionally in the Vancouver, Washington *Columbian* (Tr. 158).

10. Francis Ford advertises in the Vancouver, Washington telephone directory yellow pages as well as in the yellow pages for Portland and St. Helens, Oregon (Tr. 164-68). In all of these yellow pages advertisements, Francis Ford's ads appear in conjunction with ads for Washington-located auto dealers (including Ford dealers) who compete with Francis Ford (CX's 3610-13, 3615-16; Tr. 172-73).

11. Francis Ford arranges for other types of advertising and promotional activity in other areas of the State of Washington (CX's 3604, 3606, 3608, 3622-26, 3631-33; Tr. 162-163, 169-75).

12. Francis Ford makes occasional sales of motor vehicles to residents of states other than Oregon, primarily to persons who reside in the Vancouver, Washington area (Tr. 158, 171).

13. Over half of the retail installment contracts executed by Francis Ford customers are sold or assigned to Ford Motor Credit Company's Portland branch office, which provides financing to Ford dealers and their retail customers in an area of responsibility extending from Oregon northward to Longview, Washington (Tr. 37, 191-93). Ford Credit has other branch offices engaged in like activity throughout the United States (Tr. 34-36). A total of 724 such contracts were sold by Francis Ford to Ford Credit's Portland branch in 1976-77 (Tr. 38).

14. When vehicles sold by Francis Ford are thereafter repossessed and returned to it by the financing institutions it does business with, the repossessions may take place outside the State of Oregon or may involve an out-of-state resident who was either the original customer from whom the vehicle was repossessed or who was the purchaser upon resale after

repossession (Tr. 1048-50, 1072-81, 1087-89, 1097-98). Of the 43 repossession transactions discussed below, at least 3 involved out-of-state residents as the original customers (CX's 2771, 3021, 3083-84). Four involved repossession at out-of-state sites (CX's 2416, 2928B, 2963A-B, 3027-30), and in three the resales were to be out-of-state residents (CX's 2595, 2934, 3390; Tr. 1049).

15. In connection with its original sales and post-repossession resales of vehicles, Francis Ford has shipped used vehicles to out-of-state purchasers (CX 2595; Tr. 1049-50), and has initiated or participated in the transmission across state lines of credit reports and various instruments of retail installment credit, title registrations, licensing documents and related correspondence and payments (CX's 2922, 3083-84, 3393), and other business papers related to the extension and enforcement of credit obligations (CX 2938A-B).

16. Approximately three years before issuance of the present complaint, Francis Ford entered into a consent agreement in which it admitted Commission's jurisdiction, under the "in commerce" standard then applicable, with respect to various alleged practices including representations in newspapers and broadcast advertising, handling of customers' deposits, and preparation of retail installment contracts (82 F.T.C. 1501 (1973)).

17. Francis Ford maintains a substantial course of trade in motor vehicles and motor vehicle credit in commerce, and that trade affects commerce, as "commerce" is defined in the FTC Act.

C. Francis Ford's Retail Installment Contracts

18. About 70 percent of Francis Ford's retail sales of motor vehicles are financed in whole or in part. These consumer credit sales are drawn up on retail installment contracts which are pre-printed forms supplied either by Ford Credit or by the United States National Bank of Oregon ("U.S. Bank"). Francis Ford sells, assigns or transfers over half of these contracts to Ford Credit; the remainder go to U.S. Bank (Tr. 179, 191-93).

19. The Ford Credit installment contract form calls for monthly installment payments by the debtor to the seller

(Francis Ford) which are secured by a security interest in the vehicle by Francis Ford or its assignee. The contract provides for its assignment to Ford Credit (CX 2311). The U.S. Bank installment contract form is substantially similar to the Ford Credit form except that it contains a provision for its assignment to U.S. Bank (CX 2314B).

20. The Ford Credit contract form states that: "This contract shall be governed by the laws of the state in which the original Seller [Francis Ford] is located . . .", and identifies the security interest created thereby as "a security interest under the Uniform Commercial Code . . ." (CX 2311). The "default" provision of the contract states that:

> Seller shall have all the rights and remedies of a Secured Party under the Uniform Commercial Code, including the right to repossess the Property . . . and to recondition and sell the same at public or private sale. (CX 2311)

The U.S. Bank contract form used in such transactions recites that: "The parties [Francis Ford and its customer] agree that their relations, rights and duties under this agreement shall be governed by the substantive law of the State of Oregon" (CX 2314B). The "repossession resale" provision of the contract states, *inter alia*, that:

> Creditor Dealer will give Customer reasonable notice of the time and place of any public sale or of the time after which any private sale or other intended disposition is to be made. . . . Expenses of retaking, holding, preparing for sale, selling or the like shall include Creditor-Dealer's reasonable attorneys' fees and legal expenses. (CX 2314B)

21. The law referred to above, the UCC, was enacted in Oregon in 1961 and includes a provision that a secured party may, in the event of default, reposses the collateral and sell, lease or otherwise dispose of it and that he "must account to the debtor for any surplus . . ." (ORS ¶ 79.5040 (2)).

22. If repossession of a vehicle financed by Ford Credit occurs, Ford Credit sends a form notice to the customer (and to Francis Ford) which states:

> The [repossessed vehicle] will be sold by [Ford Credit] or its assignee at a private sale at any time after 10 days from

the date shown above unless redeemed by you prior to such sale. The proceeds will be applied first to the payment of the expenses of retaking, holding, preparing for sale and selling said property and reasonable attorney's fees and legal expenses incurred by [Ford Credit], then to the satisfaction of the balance due under the contract covering the financing of said property, and then to the satisfaction of any indebtedness secured by any subordinate security interest in said property. *Any surplus will be paid to you* and, unless prohibited by law, you will remain liable for any deficiency. (emphasis added) (CX's 1240, 2678; Tr. 955)

23. A similar statement appears in another Ford Credit form which is executed by defaulting customers when they voluntarily surrender their vehicle to Ford Credit:

> [T]he undersigned [customer] hereby voluntarily surrenders and returns to you [Ford Credit] the above-described commodity for . . . disposition . . . in conformance with law . . . The undersigned hereby requests and authorizes you to dispose of this property at public or private sale and to apply the net proceeds received therefrom against the amount of the undersigned's present indebtedness to you. If the net proceeds so realized shall be less than the said unpaid balance, after deducting your expenses, the undersigned agrees to remain liable to you for the difference thereof, plus a reasonable fee . . . as attorney fees . . . *If the net proceeds so realized is more than said unpaid balance, you agree to pay the excess to me.* (emphasis added) (CX 2655)

24. The installment contract forms and their incorporation of state law constitute an implied promise by Francis Ford, as a secured party, to account for and pay to the customer any surplus resulting from its resale or other disposition of a vehicle repossessed from the customer, and these forms, along with the notices referred to in Findings 22 and 23, have the capacity and tendency to lead customers to believe that any surpluses realized after repossession will be paid to them.

D. Repurchase Agreements

25. Since August 15, 1967, Francis Ford has been party to a series of agreements with Ford Credit under which each

retail installment contract sold or assigned by Francis Ford to Ford Credit has been governed by the terms of a "Retail Plan" set forth in a Ford Credit dealer manual titled "Automotive Finance Plans for Ford Motor Company Dealers" (CX's 2301, 2303). These agreements provide further that each retail installment contract sold or assigned to Ford Credit is deemed assigned on a "repurchase" basis unless otherwise specified (CX's 2301, 2303).

26. U.S. Bank also has a repurchase agreement with Francis Ford which is similar to Ford Credit's (CX 2307A-B, 2314B; Tr. 191-92, 1482-83).

27. Under these repurchase agreements Francis Ford is obliged, in the event of a default by the customer, and upon the lender's request and the return of the vehicle, to pay to the lender the outstanding balance on the loan (CX's 1015* and 1016, p. 20; CX 1014, p. 22; CX 2311;** Tr. 1277).

28. Since January 1973, the "repurchase" portion of the Ford Credit retail plan has included the following provision:

> EXCESS PROCEEDS ON RESALES OF REPOSSESSIONS
> If the proceeds (less reasonable selling expenses) received by the dealer from his resale of a repossessed vehicle

---

*CX 1015, p. 20 states:

> The Retail Plan contemplates a sharing of responsibility between the Dealer and Ford Credit with respect to vehicles covered by retail installment contracts on which the customer has defaulted. The standard Retail Plan is a repurchase plan under which Ford Credit assumes responsibility for confiscated vehicles, converted vehicles, certain collision damages to vehicles and for repossessing and returning vehicles to the Dealer after default, and the Dealer assumes the responsibility for repurchasing and merchandising repossessed vehicles.

**The Ford Credit retail installment contract form states:

> REPURCHASE: The [dealer] guarantees payment of the full amount remaining unpaid under said [retail installment] contract, and covenants if default be made in payment of any installment thereunder to pay the full amount then unpaid to [Ford Credit] upon demand, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted.

exceed the repurchase price of the vehicle, he should pay the excess to the customer as required by law (CX's 1015 and 1016, p. 22).

On March 9, 1973 and on July 29, 1974, Francis Ford accepted and agreed to Ford Credit retail plans containing the "excess proceeds" provision (CX 2301).

29. The repurchase agreement between Francis Ford and U.S. Bank also contains an admonition that surpluses realized on resales of repossessed vehicles should be paid to the defaulting customer as required by the UCC (CX 2307A).

30. All retail installment contracts sold or assigned by Francis Ford to Ford Credit and U.S. Bank are subject to repurchase agreements (Tr. 39, 189, 191-92, 1482-83).

E. The Benefits Of Repurchase Financing

31. Mr. James Woods, the secretary-treasurer of Francis Ford, testified that it arranges for financing its customer's vehicle purchases because its competition does so, but that because of the costs involved in handling installment contracts, Francis Ford would much rather sell cars for cash (Tr. 1276-77).

32. However, it is apparent that repurchase financing, the only type of financing available to automobile dealers in the Portland area (Tr. 189, 191), does provide certain benefits to Francis Ford. Foremost, of course, is the fact that financing sells automobiles* (Tr. 178-79, 1489, 1514, 2286).

33. There are other tangible monetary benefits which Francis Ford realizes from its repurchase agreements. When it assigns an executed retail installment contract to a financing institution on a repurchase basis, the financing institution credits a share of the total finance charge to Francis Ford. Francis Ford's share of the finance income is the amount by which the finance charge negotiated between Francis Ford and the consumer exceeds the amount of finance income for the financing institution as agreed upon between Francis Ford and that

*"If everybody sold for cash, all dealers would sell far less cars today than they do by having a contract" (Tr. 1277).

institution. For example, the interest rate which Ford Credit charged on new cars at the time of hearings was 6 percent. If the total finance charge negotiated by Francis Ford were $1,560 on a hypothetical contract, and as a result of its 6 percent rate, Ford Credit's finance charge was $1,200, Francis Ford would retain the difference between $1,560 and $1,200—$360 (Tr. 45-46).

34. Francis Ford's sale of cars on retail installment contracts also enables it to sell credit life, accident and health insurance to many customers. It receives a commission of between 35 percent and 37 1/2 percent on its sales of such insurance. Credit life, accident and health insurance meet the customer's obligation under the installment contract if the customer suffers a misfortune covered by the policy. These policies protect the customer against repossession due to sudden loss of income, while protecting Francis Ford against being called upon to perform its obligations under the repurchase agreement with the financing institution (Tr. 180).

35. "Profit centers" are the revenue generating activities of a merchandising firm which ultimately provide for payment of its indirect or fixed (overhead) expenses (Tr. 546-47). Finance and insurance income may be a major profit center for a dealership (CX 319A-F). Francis Ford realized $127,827 in finance and insurance income in 1974 and $124,407 in such income in 1975 (CX's 2321-22).

F. Repossession

1. Calculating The Payoff

36. During calendar year 1974, approximately 91 repossessed vehicles were returned to Francis Ford pursuant to its repurchase agreements with Ford Credit and U.S. Bank (Adm. 9). Approximately 85 repossessed vehicles were returned to Francis Ford by these lending institutions in 1975 (Adm. 8).

37. When Ford Credit and U.S. Bank return a repossessed vehicle to Francis Ford, they calculate a "payoff," that is the amount which the defaulting customer owed them but which,

by virtue of the repurchase agreements, Francis Ford now owes them. Francis Ford then looks to the defaulting customer to reimburse it for the payoff plus other legitimate expenses incurred in preparing the repossessed vehicle for sale and in reselling it.

38. The payoff does not equal the amount owed on the installment contract, for it is adjusted by credits for any prepaid but unearned finance charges or insurance premiums, and by charges for such items as collision damage and expenses of repossession by the financial institution (CX's 1016, pp. 20-22; 2307A-B; 2396A, 2564, 2566A-2569, 2571; RX 2565; Tr. 55-59, 62-63).

a. Finance Charges

39. When Francis Ford sells a vehicle under a retail installment contract, the contract customarily provides for the customer to pay a finance charge which is included in the face amount of the contract (*e.g.*, CX 2581A).

40. When Francis Ford assigns a retail installment contract to Ford Credit or U.S. Bank, the financing institution credits Francis Ford's reserve account with the amount by which the gross finance charge negotiated between Francis Ford and the customer exceeds the discount rate agreed to between Francis Ford and the financing institution (CX 1054A-C; Tr. 46-50, 1509-11; Finding 33). The financing institution then sends Francis Ford a check for the unpaid balance owing on the vehicle plus the amount of any premiums for creditor's life, accident, or health insurance financed under the contract which Francis Ford has arranged through its independent broker (CX 2396A; Tr. 48-49).

41. The Ford Credit and U.S. Bank retail installment contract forms used by Francis Ford provide that if the buyer prepays the obligation in full, the buyer will receive a rebate (credit) of the unearned portion of the finance charge computed under the Rule of 78 (sum of the digits method)* after deduct-

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*The "Rule 78" is a method for prorating finance charges and insurance premiums in the event of early payoff, redemption, or

ing an acquisition fee of $15 (CX's 2311 [¶ 14], 2441, 3421, 3461).

42. In the event of an early payoff by a customer purchasing a vehicle under a retail installment contract held by a financing institution pursuant to a repurchase agreement with an automobile dealer, the gross finance charge is prorated by the financing institution under the Rule of 78. The face amount of the contract is then reduced by the amount of the unearned gross finance charge to obtain the payoff. The amount of the finance charge previously credited to Francis Ford, being a part of the gross finance charge, is also prorated under the Rule of 78, and the unearned portion is charged to its reserve account. No charge is made to the customer for the unearned finance charge Francis Ford or the financing institution would have earned had the contract continued for its maximum term (CX's 1954A-C, 2396A, 2431, 3516; Tr. 2267-71).

43. Professor Johnson, one of Francis Ford's expert witnesses, gave an example of proration under the Rule of 78, assuming that the finance institution made a loan on which it assessed a finance charge of $100 for 12 months. If the debtor paid off the loan prior to the end of its term, after 60 percent of the finance charges were earned by the finance institution, $40 would be credited to him under the Rule of 78. If an automobile dealer, because of a repurchase agreement, were entitled to 20 percent of the finance charge ($20) he would, upon early payment, be required to refund his share of the unearned finance charges. In such a case, the finance institution would credit the same amount ($40) to the debtor and would charge the dealer's reserve account for his share—$8 (20 percent of $40)—of the unearned finance charge (Tr. 2267-71).

44. In the event of a repossession under a retail installment contract held by Ford Credit under a repurchase agreement followed by a subsequent redemption of the vehicle by the customer, the customer's payoff and Francis Ford's chargeback are accounted for in the same method as reflected in

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repossession under a retail installment contract (CX 3516; Tr. 55-56, 88, 2267-73).

Finding 42 except that any out-of-pocket expenses incurred in making the repossession are added to the payoff amount to be paid by the redeeming customer (CX 2396A; Tr. 62-63); and, in the event of a repossession from a customer purchasing a vehicle under a retail installment contract held by a financing institution pursuant to a repurchase agreement, Francis Ford's payoff and chargebacks are accounted for by the same method as in Finding 42 (CX's 2396A, 2431; Tr. 69-70, 2267-71).

45. The amount of the Francis Ford's chargeback representing its share of the unearned finance charge for the period after early payoff, redemption, or repossession is not charged or collected as an expense from the customer (CX's 2396A, 2431; Tr. 56-58, 62-65, 69-71, 2270).

b. Insurance

46. When Francis Ford sells creditors' life, accident, or health insurance in connection with the sale of a vehicle under a retail installment contract, the gross insurance premium is included in the face amount of the contract (*e.g.*, (CX 2581A). Francis Ford obtains such insurance through independent brokers, and receives a share of the insurance premium (Tr. 1178).

47. In the event of an early payoff by a customer purchasing a vehicle under a retail installment contract held by Ford Credit pursuant to a repurchase agreement where the customer has purchased creditor's life insurance from Ford Life Insurance Company, Ford Credit prorates the amount of the gross insurance premium under the Rule of 78. The face amount of the obligation is then reduced by the amount of the unearned gross premium. The portion of the gross premium previously credited to Francis Ford is prorated under the Rule of 78 and the unearned portion is charged back to the dealer (CX 2396A; Tr. 52, 55-56, 85-88, 139).

48. In the event of either an early payoff or repossession on a direct loan on which U.S. Bank has sold creditor life, accident, or health insurance and received a commission, the gross insurance premium is prorated and the balance owing is reduced by the amount of the unearned gross premiums (Tr. 1526-33).

2. Resale Of The Repossessed Vehicle

a. Francis Ford's Practice

49. Francis Ford enagages in substantial sales of used vehicles to retail customers (Finding 3). When, pursuant to its repurchase obligation, Francis Ford receives a repossessed vehicle from Ford Credit or U.S. Bank, it treats most of them in the same manner as other used vehicles which it has obtained through other methods and often sells them at retail.*

50. There is some evidence in the record that Francis Ford has obtained prices close to retail book value for repossessed vehicles:

a. The Wallace P.** repossession was resold for $1,425 on 6/21/75 (CX 2501). It was a 1969 Ford Pickup, Model F100 (CX 2561), with 87,855 miles on it at the time of resale (RX 2570A). The retail blue book value for this vehicle was $1,560 (RX 10, p. 234), less a mileage adjustment of $135 (RX 10, p. 10), leaving a retail blue book value of $1,425. The wholesale blue book value for this vehicle was $1,125 (RX 10, p. 234), less a mileage adjustment of $100 (RX 10, p. 10), leaving a wholesale blue book value of $1,025.

b. The Hugh W. repossession was resold for $5,275 on 8113175 (CX 2503). It was a 1975 Ford Elite with 9,220 miles on it at the time of resale (RX 2609A). The retail blue book value for this vehicle was $5,270 (RX 11, p. 102), plus a mileage adjustment of $100 (RX 11, p. 8) leaving a retail blue book value of $5,370. The wholesale blue book value for this vehicle was $4,150 (RX 11, p. 102), plus a mileage adjustment of $75 (RX 11, p. 8), leaving a wholesale blue book value of $4,225.

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*Forty-one of the 43 repossessed vehicles on which Francis Ford realized surpluses were sold at retail by a person to whom Francis Ford paid a salesman's commission (CX's 2501-43; Tr. 932).

**Complaint counsel have requested that the full names of the persons involved in the repossessions analyzed in this decision not be revealed.

c. The Gregory D. repossession was resold for $2,702 on 3/15/75 (CX 2504). It was a 1973 Pinto, two-door, S/W, four-speed manual transmission, with 27,173 miles on it at the time of resale (RX 2637B). The retail blue book value for this vehicle was $2,605 (RX 9, p. 95), plus a mileage adjustment of $100 (RX 9, p. 10) and less an accessory adjustment for manual transmission of $65 (RX 9, p. 11), leaving a retail blue book value of $2,640. The wholesale blue book value for this vehicle was $1,950 (RX 9, p. 95), plus a mileage adjustment of $75 (RX 9, p. 10) and less an accessory adjustment for manual transmission of $50 (RX 9, p. 11), leaving a wholesale blue book value of $1,975.

d. The Benjamin T. repossession was resold for $4,750 on 8/12/75 (CX 2506). It was a 1975 Mustang II Ghia, V-8 (RX 2671), with 3,365 miles on it at the time of resale (RX 2684). The retail blue book value for this vehicle was $4,675 (RX 11, p. 102), plus a mileage adjustment of $65 (RX 11, p. 10) and plus an accessory adjustment of $265 (RX 11, p. 102), leaving a retail blue book value of $5,005. The wholesale blue book for this vehicle was $3,650 (RX 11, p. 102) plus a mileage adjustment of $50 (RX 11, p. 10) and plus an accessory adjustment for V-8 engine of $200 (RX 11, p. 102), leaving a wholesale blue book value of $3,900.

e. The Ronald A. repossession was resold for $3,295 on 2/18/75 (CX 2509). It was a 1972 Ford Gran Torino, two-door, sports roof (RX 2761), with 53,669 miles on it at the time of resale (RX 2756A). The retail blue book value for this vehicle was $2,885 (RX 8, p. 94), less a mileage adjustment of $200 (RX 8, p. 9), leaving a retail blue book value of $2,685. The wholesale blue book value for this vehicle was $2,175 (RX 8, p. 94), less a mileage adjustment of $150 (RX 8, p. 9), leaving a wholesale blue book value of $2,025.

51. In practice, Francis Ford has never compared income and expenses on repossessed vehicles at the time they were resold to determine whether surpluses resulted therefrom (Tr. 1086-87, 1175). Instead, Francis Ford has assumed, because of the way it values repossessed vehicles, that their resale always resulted in a deficiency (Tr. 1253, 1373, 1375).

52. The one occasion on which Francis Ford did compare income and expenses on repossessed vehicles resulted from a June 27, 1975 letter from the Commission's Seattle Regional Office. In response to this letter, and upon the advice of its then counsel, Francis Ford prepared and submitted to the Seattle Regional Office in July 1975 a summary tabulation of income and expenses on each of 27 repossessed vehicles returned to it by Ford Credit and U.S. Bank between October 1 and December 31, 1974 (CX 2344; Tr. 210-24, 1119-21, 1135, 1161). This summary tabulation was drawn from various types of records maintained by the dealership, including (a) records showing costs directly attributable to preparation and resale of the vehicles and (b) records showing certain department-wide and overall dealership expenses, indirect in nature (*e.g.*, imputed capital costs, general advertising, lot maintenance and other overhead items such as phone, water, lights and rent), which Francis Ford apportioned to the 27 vehicles on a prorata basis (Tr. 1123-24, 1128-31, 1134).

53. Among the records of direct outlays for these repossessed vehicles which Francis Ford consulted in preparing these tabulations were the internal repair orders it had generated at the time of reconditioning the 27 vehicles in question. For purposes of its response to the Commission's Seattle Office, Francis Ford altered many of the repair orders applicable to these vehicles by crossing out figures which it concluded were too low and entering higher or additional figures (Tr. 1146-51).

54. According to this analysis, and taking the figures supplied by Francis Ford at face value, 22 of the 27 vehicles had been resold (as of July 16, 1975) and 10 of the 22 had generated surpluses ranging in amount from $19.15 to $923.93 and totaling $3,195.84 (CX 2344).

55. On or about July 23, 1975, upon advice of its then counsel, Francis Ford prepared and sent to each of the persons from whom the above 10 vehicles had been repossessed a check in the amount of the "surplus"—or "amount over and above sales expenses"—thus determined (*e.g.*, CX's 3336, 3339; Tr. 221-24).

56. Except for the 10 checks drawn on or about July 23, 1975 in connection with its response to the Commission's Seattle Office, Francis Ford has never paid or attempted to pay any money to defaulting customers as a refund of surplus and has never advised defaulting customers in any way that money was received by Francis Ford in excess of its expenses and other outlays on the vehicles repossessed from such customers (Adm. 3A; Tr. 222, 483-84).

b. Wholesale Value vs. Resale Price

57. Francis Ford attempts to justify its conduct by arguing that it need not compute surpluses because the value which should be assigned to repossessed vehicles is not the actual selling price (generally a retail price) but an estimated wholesale value.

58. Financial institutions in the Pacific Northwest, including Portland, Oregon, do sell repossessed vehicles,* often through auto auctions, at wholesale (Tr. 118-19, 1890-91); and, when they compute surpluses or deficiencies, can legally (and complaint counsel concede this (Tr. 1223)) use the wholesale price as the "fair market value" of the vehicle.**

59. Because the wholesale price seldom exceeds the payoff when financial institutions are obliged to resell repossessed vehicles, they rarely realize surpluses. A loan officer for the U.S. Bank testified that he had seen no surpluses on the sale of repossessed vehicles in more than 20 years (Tr. 1505). The local office manager of Ford Credit said that he had seen only one surplus on the sale of repossessed vehicles in 16 years (Tr. 406).

60. However, Francis Ford, unlike Ford Credit and U.S. Bank, has used car facilities through which it can, and does, sell repossessed cars and it often obtains a retail price on those resales; nevertheless, Francis Ford claims that it makes no

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*Vehicles which are not returned to dealers under repurchase agreements, and which the financial institutions therefore must dispose of.

**See *Mount Vernon Dodge, Inc.* v. *Seattle-First Nat'l Bank*, 18 Wn. App. 569, 570 P.2d 702, 712 (1977).

economic sense to require it to credit a defaulting customer with the price at which a repossessed vehicle was sold, for that price was realized through Francis Ford's, not the customer's, efforts.

61. This argument finds some support in the testimony of two experts called by Francis Ford. Professor Dale O'Bannon, a teacher of economics at Lewis and Clark College in Portland, Oregon, testified with respect to the economic concept of "opportunity cost"—that is, a cost which has occurred by foregoing some particular kind of activity—and its application to the issue of repossession surpluses (Tr. 1571-72).

62. Professor O'Bannon, after being asked to make certain assumptions,* testified that a repurchase dealer loses the opportunity to make a normal sale when he is forced to fulfill his repurchase obligations (Tr. 1583). At the same time, the defaulting purchaser (assuming that there is a surplus calculated on the basis of the actual resale price) would receive the value added by the dealer, a value which is due to the dealer's capital investment (Tr. 1587, 1645).* Thus, according to Dr. O'Bannon, "economic fairness" dictates that a dealer who resells a repossessed vehicle at retail, and who is permitted by

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*a. That a dealer in used vehicles has limited capital and limitations on his capacity to sell cars;

b. That the dealer has substantial experience in choosing and selling used cars for his account;

c. That the dealer has available to him virtually every current make and model of used vehicle;

d. That the dealer is required to use his capital to buy back, as a forced purchaser, a repossessed car and sell it at retail. (Tr. 1578)

*It is apparent that in some cases, Francis Ford's facilities and professional sales staff have generated a higher resale price on repossessed vehicles than would have been obtained by the defaulting purchaser if he had resold it (Tr. 722, 731, 770, 772, 786, 798, 892), and it can be said that Francis Ford's efforts have added value to the vehicles.

law to recover reasonable expenses, should be permitted to retain the difference between its wholesale value and the price at which it was sold. This figure would include commissions, necessary repairs to the vehicle, contributions to overhead, and profit**—that is, his normal gross margin (Tr. 1594-95).

63. Professor Robert Johnson, director of the credit research center, Purdue University, has a doctorate in finance and was a consultant under contract with the Federal Trade Commission's Office of Policy Planning who was hired to evaluate proposed trade regulation rules on creditors' remedies, one of which deals with repossession practices (Tr. 2149-50). This proposed rule would require that the defaulting customer be credited, when calculating a surplus or deficiency, with the retail value of the repossessed article (Tr. 2154).

64. In testifying on the effects of the relief sought by complaint counsel, Professor Johnson postulated a hypothetical repossession in which the wholesale value of the vehicle was $2,000, the payoff was $2,000 and the gross margin was $400 (*i.e.*, the vehicle was sold for $2,400) (Tr. 2174).

65. If complaint counsel prevail, according to the Professor, the defaulting customer, rather than the dealer, would be entitled to the $400 margin.*** The "loss" of this $400—and the probability of similar "losses" on other repossessions—would force the dealer to make adjustments in his business: he might lower the price he pays for trade-ins, raise the prices of cars he sells, or take steps to weed out those customers who are repossession risks and, in the process, deny credit to customers who would have been good risks (Tr. 2176-78). There would also be an industrywide impact on creditors, who would resort to nonrecourse financing (Tr. 2180-81), on credit sales, which

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**According to Dr. O'Bannon, profits are an expense because they "are nothing more than the cost of keeping a firm in business." (Tr. 1595).

***The hypothetical assumes no out-of-pocket costs to prepare the car for sale (Tr. 2175).

would be lower, on new car sales and on new car prices (Tr. 2183-84).

66. Despite what appears to be a logical basis for the theories of Professors O'Bannon and Johnson, I cannot accept them for several reasons. The first—a legal one—will be discussed in my conclusions of law. Second, the theories are based on an assumption—the unlimited availability of every make and model of used car—which is questionable (Tr. 1591, 1607, 1906, 2249). Third, there would be a potential for substantial abuse if the dealer were permitted to retain his "normal" margin on the resale of a repossessed vehicle, for the computation of that margin would depend on a wholesale appraisal by the person who would benefit from application of the theories of Francis Ford's experts (Tr. 2300-01).

67. Professor Johnson conceded that economists prefer that value be established through an arm's length transaction rather than by an appraisal but he argued that abuse could be prevented by setting up an enforcement procedure that would "make it in the self interest of the wholesale manager to accurately establish the wholesale price" (Tr. 2327). However, neither he nor any other witness outlined the procedure which could be used or gave any estimate of the costs which might be involved in policing wholesale appraisals by retail dealers. Furthermore, in addition to the fact that it is required by the UCC and Oregon law, the virtue of complaint counsel's theory is that it makes computation of surpluses or deficiencies relatively simple, for the price to be used is one which has been determined in an arm's length transaction. Finally, I cannot ignore the requirement of the UCC because of possibly adverse economic effects if the proposed order were imposed upon the automobile industry for this is a question of administrative discretion which only the Commission has the authority to deal with.

68. For these reasons, I find that the appropriate price for determining whether Francis Ford realized a surplus or suffered a deficiency on the resale of repossessed vehicles is the actual resale price of those vehicles.

G. Allowable Expenses

1. Overhead

69. The parties agree that under the UCC Francis Ford can deduct from the price at which it sells a repossessed vehicle all costs directly resulting from its repossession, preparation for sale and resale. However, complaint counsel argue that only these costs are deductible and that overhead (indirect) expenses are not.

70. In support of their position, complaint counsel called Dr. Gerald L. Cleveland, a professor of accounting at Seattle University. Dr. Cleveland testified that the following overhead expenses should not be allowed as deductions when a dealer calculates a surplus or deficiency because this would allow the dealer to recover the same expenses twice:

a. Rental expenses for a used car lot.
b. Imputed interest on dealer funds invested in a repossessed car.
c. Interest on funds borrowed by the dealership.
d. Depreciation on the dealership's buildings.
e. Administrative accounting expenses.
f. Salaries of supervisors.
g. Salaries of lot boys. (Tr. 540, 561-65, 566-67, 654-55, 694-95)

71. Although he claimed that his theory is based upon accepted accounting principles, Dr. Cleveland's conclusion seems to be derived not from widely accepted principles but from his belief that a dealer who resells a repossessed automobile is a fiduciary of the defaulting customer with respect to surpluses (Tr. 557). Dr. Cleveland believes that a dealer-fiduciary should not benefit from his trust (Tr. 560) but he has not, in my opinion, satisfactorily explained what accepted accounting principle prohibits a fiduciary from recovering legitimate overhead expenses.

72. I must conclude, as did respondent's expert witness, Mr. James W. Porter, that a dealer who repossesses a vehicle

does incur overhead expenses in preparing it for sale and in reselling it which do not duplicate overhead expenses which were incurred when the car was sold to the defaulting purchaser. Mr. Porter, a CPA who has performed accounting functions for some 350 automobile dealerships since 1946 (Tr. 1730), testified that while accountants might differ over whether certain costs are fixed or not, accountants agree that overhead costs are considered costs of sale which should be allocated (deducted) from the resale price of a repossessed vehicle (Tr. 1770-71, 1804).

73. While I accept the principle that a dealer does incur overhead expenses when he resells a repossessed vehicle, the problem of determining what that cost is forces me to conclude that, as a practical matter, overhead should not be deductible from the resale price of that vehicle. Mr. Porter's explanation of how overhead would be allocated to the resale of each repossessed vehicle in a dealer's inventory reveals that a cost study of Francis Ford's business would have to be done periodically to determine these expenses (Tr. 1757-63, 1768-72, 1824).

74. I agree with Dr. Cleveland that in setting up a system under which Francis Ford should be required to account for surpluses (or deficiences) on repossessed vehicles, the paramount consideration should be simplicity and minimal cost of compliance (Tr. 557-58). Allowing the allocation of overhead might impose expenses for a cost accounting system which exceed the overhead expenses which are computed. Furthermore, Commission compliance efforts would be greatly complicated, for the validity of the cost allocations would have to be determined periodically.

75. Disallowing overhead expenses is not, in my opinion, unfair, for other businesses involved in repossessions which have overhead expenses do not deduct them when they compute surpluses or deficiencies. Financial institutions deduct only out-of-pocket expenses (those directly resulting from the repossession) in calculating the amount of a surplus or a deficiency (CX 1225A-E; Tr. 167-68, 694, 1226). In computing surpluses or deficiencies realized on nonrecourse repossessions, Ford Credit deducts from the resale price only the

payoff balance and the out-of-pocket expenses paid out to third parties (Tr. 703-04). Overhead is not included as an expense (Tr. 704).

76. In the period from 1972 through 1974, Ford Credit's Central Collections Department attempted to collect deficiences for Ford dealers with respect to certain repurchase accounts. In determining the collectible expenses of dealers, Ford Credit included only the dealer's out-of-pocket expenses (Tr. 707).

77. Since 1971 or earlier, on the advice of counsel, Damerow Ford Company of Beaverton, Oregon (a competitor of Francis Ford) has computed and paid surpluses realized upon the resale of repossessed vehicles by deducting the payoff, direct costs of repairs, and sales commission from the resale price. Overhead has not been deducted (Tr. 839-51).

2. Over And Underallowances

78. An overallowance may occur when a vehicle is received by an automobile dealer in trade. An overallowance is the amount by which the agreed trade-in amount exceeds the wholesale value of the vehicle (Tr. 674, 1015-18, 1020-23). An underallowance may occur when a vehicle is received by an automobile dealer in trade. An underallowance is the amount by which the agreed trade-in amount is less than the wholesale value of the vehicle (Tr. 682, 1016-17, 1019, 1032).

79. Francis Ford had underallowances and overallowances on some of the repossession dispositions in evidence in this proceeding (RX's 2663-64, 2702-03, 2763, 2765; Tr. 1995, 2003, 2006, 2014).

80. Overallowance or underallowances affect the determination of resale proceeds for a repossessed vehicle (Tr. 554). An overallowance is a subtraction from the selling price of the repossessed vehicle and an underallowance is an addition to the selling price (RX 2400D; CX 2344).

3. Other Expenses

The out-of-pocket expenses which are allowable when computing a surplus or deficiency include the cost of repairs in

preparing the vehicle for resale, towing and storage charges, and commissions paid to salesmen and their supervisors who actually participate in the sale of the repossessed vehicle. Post-resale repairs are also allowable if they are a condition of sale.

82. Contrary to Francis Ford's claim, I find that charge-backs on the unearned portion of finance charges or insurance premiums are not an expense and cannot be deducted from the resale price of a vehicle which it repossesses.

4. Surpluses Realized By Francis Ford On Sales Of Repossessed Vehicles

83. Complaint counsel offered in evidence 43 charts which analyze the sale by Francis Ford of repossessed vehicles (CX's 2501-43). Their proposed findings duplicate each of these charts with some corrections (for example, on line 26, commissions paid by Francis Ford to assistant sales managers which complaint counsel now concede are deductible expenses).

84. I find that the charts accurately reflect, as to each transaction, the resale price of the vehicle in question, the net payoff made by Francis Ford to the financial institution, adjustments to the resale price for overallowance or underallowance and all legitimate expenses incurred by Francis Ford in preparing the vehicle for sale and in reselling it.

85. The repossession charts disclose, and I find, that Francis Ford realized the following surpluses, in six of which it made some payment to the defaulting customer. In only one of those six cases did the customer receive the total surplus.

CX #	Customer Name	Amount of Surplus	Payment By Francis Ford To Customer
2501	Wallace P.	$545.86	None
2502	Bruse S.	$268.00	None
2503	Hugh W.	$ 89.74	None
2504	Gregory D.	$848.35	None
2505	Stanley D.	$513.65	None
2506	Benjamin T.	$153.02	None
2507	Odeh D.	$633.36	None

2508	Richard W.	$281.14	149.92
2509	Ronald A.	$460.60	None
2510	Lloyd D.	$220.16	None
2511	Raymond H.	$327.17	None
2512	L.C.Y.	$806.48	None
2513	Art F.	$221.85	None
2514	Richard L.	$173.14	None
2515	Birdie T.	$336.96	None
2516	John C. H.	$169.31	None
2517	William K.	$161.02	None
2518	Dale W.	$110.98	None
2519	Charles R.	$506.87	None
2520	Gary R.	$411.01	$ 80.12
2521	Robert S.	$ 71.50	None
2522	Harold L.	$611.02	$230.72
2523	Steve C.	$544.93	None
2524	Rex B.	$386.56	None
2525	Matt M.	$385.61	None
2526	Thomas B.	$1,064.43	None
2527	Daniel D.	$348.03	None
2528	Robert C.	$605.67	None
2529	Harry E.	$184.26	None
2530	Keldon A.	$ 96.37	None
2531	Jack D.	$ 76.01	None
2532	William M.	$1,164.29	None
2533	Brian K.	$133.44	None
2534	Thomas H.	$351.22	None
2535	Paul M.	$377.35	$ 85.17
2536	Lee B.	$547.79	$738.63
2537	John R.H.	$1,045.73	None
2538	Patricia C.	$518.26	$201.19
2539	Robert T.	$152.50	None
2540	Paul S.	$368.66	None
2541	Clifford B.	$232.20	None
2542	John B.	$299.44	None
2543	Charles M.	$333.91	None

These repossession transactions produced over $17,000 in surpluses initially withheld by Francis Ford. Francis Ford continues to retain some $15,000 from the surpluses in 42 of the transactions.

H. The Typical Defaulting Customer

86. As would be expected, and as has been found in some studies, many of the customers from whom vehicles are repossessed have financial problems, are ill, or unemployed (Johnson, Tr. 2226). Included among the Francis Ford customers whose vehicles were sold at a surplus were a customer who could not read (Tr. 896), a person whose spouse was suffering a mental breakdown at the time of repossession (Tr. 828), and a person who had lost his $425 per month job and was no longer able to make his $171 monthly payments on the financing Francis Ford has arranged ($64 per month for the borrowed down payment and an additional $107.10 payments on the retail installment contract held by Ford Motor Credit) (Tr. 748, 754, 755). Other specified reasons for default which are listed in legible documents in the record include reduced income (CX's 2779, 2925, 2964A, 3025A, 3343A), unemployment (CX's 2855, 3104B), and bankruptcy (CX 3145A).

III. CONCLUSIONS OF LAW

A. The FTC Act And The Definition Of "Unfair"

The theory of the complaint is that the retention of surpluses on the resale of repossessed vehicles is an "unfair" practice within the meaning of Section 5 of the FTC Act. This vague standard has, fortunately, been fleshed out considerably in the past several years by the Commission, most clearly in the following definition which was quoted by the Supreme Court in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972):

> The Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair: "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of fairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or

other businessmen)" 'Statement of Basis And Purpose of Trade Regulation Rule 408 . . .' " 29 Fed. Reg. 8324, 8355 (1964)

Complaint counsel argue that Francis Ford's retention of surpluses meets all three of the "unfairness" definitions announced by the Commission; the practice is, they claim, a violation of state law; it is immoral, unethical, oppressive and unscrupulous; and, it injures those consumers who they call "repossession victims."

B. The UCC And Oregon Law

Oregon law regarding the obligation to pay surpluses realized on the resale of repossessed vehicles is, according to complaint counsel, derived from Article 9 of the UCC (Oregon Revised Statutes (ORS) §§ 79.1010-79.5070). Francis Ford, on the other hand, argues that a dealer's rights with respect to repossessed vehicles are controlled not by Article 9, but by Article 2. If applicable in this case, Article 2 would permit Francis Ford to recover consequential damages, including overhead costs and lost profits when a customer defaults, for UCC § 2-708(2) provides:

> If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer. . . .

Francis Ford relies on the draftsmen's comments to § 9-113 for its claim that it is entitled to lost profits and overhead under Article 2: "[A] seller who reserves a security interest by agreement does not lose his rights under the Sales Article (Article 2) . . ." (§ 9-113, Comment 5). This comment is taken out of context. The language of § 9-113 and other comments on that section make it very clear that the rights of a secured party on default by the debtor are governed by Article 2 *only* if the security interest arises *under* Article 2, *e.g.*, liens arising by operation of law where the buyer does not have possession of the goods. In this case, however, Francis Ford's security interest arises from a specific provision of Article 9 (see UCC

§ 9-102(1)) and, since Article 9 creates that interest, Article 9, not Article 2, defines the rights and obligations of the secured party and the debtor.

Francis Ford's argument is also erroneous because UCC § 2-708 provides for seller's damages only if there has been nonacceptance or repudiation by the buyer. Such breaches occur under Article 2 when a party by over communication or action informs the other party that he does not intend to render any performance under the contract or when a party hinders the other party from any performance. (See UCC § 2-610 and *J. White and R. Summers, Handbook of the Law Under the Uniform Commercial Code*, 1972, pp. 168-175). Since repossessions by dealers occur only after a vehicle has been sold by delivery and acceptance (performance by both buyer and seller) § 2-708 is inapplicable, and Francis Ford's citation of cases allowing recovery of lost profits is misplaced because they concern either nonacceptance or repudiation of a contract and do not deal with Article 9 security interests.

Finally, the drafters of the UCC intended Article 9 to be "a compehensive scheme for the regulation of security interests in personal property . . ." UCC § 9-101, Official Comment. Its aim is to provide a unified structure for the regulation of sales made on credit where the goods serve as a security for the extension of credit, whereas Article 2 deals with the formation of unsecured sales contracts and the rights of the parties to those contracts. It was not intended to govern secured transactions* and I do not accept the argument that its provisions are controlling here.

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*See UCC § 2-102:

> Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction. . . .

The comment to this section states that the words, "security transactions" are "used in the same sense as in the Article on Secured Transactions (Article 9)."

UCC § 9-102(1) states that Article 9 applies to any transaction which is intended to create a security interest in personal property and to any sale of accounts or chattel paper. Security interests** created by pledge, assignment, conditional sale and other devices are expressly included under the coverage of Article 9. UCC § 9-102(2).

Pursuant to the retail installment contract it enters into with its customers and UCC § 1-201(37), Francis Ford is a secured party. When Francis Ford sells or assigns its security interest in the financed vehicle either to Ford Credit or U.S. Bank, those institutions become the secured parties:

> "Secured party" means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel papers have been sold. UCC § 9-105(1)(m), and Comment 2.

When either Ford Credit or the U.S. Bank repossesses a vehicle and returns it to Francis Ford pursuant to a repurchase agreement, Francis Ford once again becomes the party holding a security interest in the vehicle:

> A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article. UCC § 9-504(5).

After Francis Ford fulfills its repurchase obligation and resells the repossessed vehicle, it, as the secured party, is required to pay any surplus due, and may pursue any deficiency owed by, the defaulting customer:

> If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. . . . UCC § 9-504(2).

**Defined in UCC § 1-201(37) as "an interest in personal property or fixtures which secures payment or performance of an obligation."

In its retail installment contracts with customers, Francis Ford recognizes and acknowledges its duty under state law to pay any surpluses realized upon resale of a repossessed vehicle (Findings 20, 21).

C. Francis Ford Has Realized, And Has Not Paid, UCC Surpluses

1. Introduction

There is no serious dispute that Francis Ford is required by state law to pay surpluses to defaulting customers; rather, the dispute is over the price which may be used, and the deductions which may be made from that price, in calculating a surplus or deficiency. The language of the UCC and court interpretations of that language reveal that complaint counsel's claims are correct, *i.e.*, (1) that the price which must be used under the UCC to calculate surpluses or deficiencies is, for dealers such as Francis Ford, the actual price (in many cases the retail price) at which the repossessed vehicle was sold and (2) that overhead is not a deductible expense which may be charged against the resale price.

2. Actual Sale vs. Wholesale Appraisal

Francis Ford argues that the amounts which should be credited to the repossessions analyzed by complaint counsel are the wholesale values of the vehicles, not the prices at which they were sold. This position is contrary to the repurchase agreements Francis Ford has with U.S. Bank and Ford Credit. The Ford Credit agreement refers to "excess proceeds on resale," and the U.S. Bank version speaks of ". . . an excess of net proceeds upon the sale. . . ." (Finding 28 and CX 2307A). Furthermore, the notices sent to defaulting customers by Ford Credit and to Francis Ford contemplate that the repossessed vehicles will be sold (Finding 22).

Section 9-504 of the UCC also supports complaint counsel's argument:

> A secured party after default may sell, lease or otherwise dispose of any or all of the collateral . . . the proceeds of

> disposition shall be applied . . . to . . . the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like. . . . UCC § 9-504(1).
>
> Disposition of the collateral may be by public or private proceedings. . . . Sale or other disposition. . . . UCC § 9-504(3). See also Comments 1, 5 and 6.

The words "sell," "lease" or "otherwise dispose" clearly refer to a situation in which the dealer parts with possession of the vehicle,* and indeed, Francis Ford did so in the repossessions analyzed above. Nowhere—in the UCC, the comments or court interpretations—is there any suggestion that a dealer who sells a repossessed vehicle at retail can assign a wholesale value to it for purposes of meeting his obligations under § 9-504. Such an interpretation would defeat its purpose:

> The purpose of § 9-504(5), UCC, is to insure that the value of repossessed collateral is measured by a bona fide sale in the marketplace, and not by an artificial value [such as] the balance due on the debtor's contract. *Reeves v. Associates Financial Services Co., Inc.*, 197 Neb. 107, 247 N.W.2d 434, 439 (Neb. App. 1976).

See also *Carter v. Ryburn Ford Sales, Inc.*, 451 S.W.2d 199 (Ark. Sup. Ct. 1970), an action by a Ford dealer to recover a Ford truck. In computing the deficiency, the dealer's calculation was based on his having credited the debtor with an estimated value of the vehicle. This "purchase" by the dealer was held to be not in conformity with the Uniform Commercial Code. To the same effect see *Vic Hansen & Sons, Inc. v. Crowley*, 57 Wis.2d 106, 203 N.W.2d 728, 733 (1973), where the court said such "a practice has no place in a private sale of a debtor's collateral . . ." Also, California's motor vehicle law contains a provision parallelling UCC § 9-504 whch makes it clear that the surplus is to be determined from the proceeds of resale. The statute provides for a written accounting itemizing

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*UCC § 9-505 does permit retention of collateral in discharge of an obligation under certain circumstances but the fact that this section was included in the UCC indicates that § 9-504 contemplates the secured party's relinquishment of the collateral.

the following data on each repossessed vehicle: (1) the gross proceeds of the disposition, (2) reasonable and necessary expenses incurred in retaking, holding, preparing for and conducting the sale, and certain attorneys' fees and legal expenses, and (3) satisfaction of the indebtedness. Cal. Civ. Code § 2983.2(b). It goes on to recite that:

> In all sales which result in a surplus, the seller or holder shall furnish [such] an accounting [to the debtor/buyer]. Such surplus shall be returned to the buyer within 45 days after the sale is conducted. [Cal. Civ. Code § 2983.2(c)].

I also reject Francis Ford's argument that § 83.830(1)(b) of Oregon's Consumer Credit Act permits it to value repossessed vehicles at wholesale and that the Act therefore repeals the UCC's requirement that the resale price of the vehicle be credited to the defaulting customer. First, many vehicles are sold within 90 days of repossession and, if they are sold at retail, that price would be the "fair market value" under the Act. Second, if a particular vehicle were not sold at the time a deficiency suit were brought, I believe that the Oregon courts would require a retail dealer such as Francis Ford to value the vehicle at an estimated retail price for purposes of computing any deficiency.

3. Retail vs. Wholesale Disposition And The "Best Possible Price"

While I accept the proposition that Francis Ford must value repossessed vehicles at their actual selling prices, and not at estimated wholesale values, this conclusion produces a rather interesting result, for what the defaulting customers are owed under UCC § 9-504 is not the result of some intrinsic residual values in the repossessed vehicles (after the payoff and repossession expenses are satisfied) but is dependent upon the status of the reseller. For example, if Ford Credit repossesses a vehicle from a defaulting customer and, because it has no repurchase agreement with a dealer, disposes of it at wholesale (since it has no retail facilities), the wholesale price would, complaint counsel concede (Finding 58), be the "proceeds" which, under § 9-504, Ford Credit would use to calculate a

surplus or deficiency. If that wholesale price were equal to the payoff plus legitimate expenses, the defaulting purchaser would not receive any payment of surplus. On the other hand, if Francis Ford, by virtue of its repurchase agreement, took possession of the same vehicle and resold it at retail, it would, under the UCC, be obliged to credit the same defaulting customer with the retail price. If that retail price exceeded the payoff plus legitimate expenses, a surplus would be owed the defaulting customer.

Francis Ford asks why it cannot assign a wholesale value to vehicles which it repossesses which is equal to the wholesale price which Ford Credit can lawfully assign to vehicles which it repossesses. The answer which complaint counsel give—that Ford Credit has no retail facilities while Francis Ford does—is not convincing for it tends to support Professor O'Bannon's argument that surpluses are realized because of Francis Ford's retail facilities and expertise (Finding 62).

The answer is much simpler: Despite the apparent soundness of Professor O'Bannon's economic argument, the UCC requires a retail dealer like Francis Ford to compute surpluses or deficiencies using the price at which the repossessed vehicle was sold, and that price would generally be the retail price, for disposition at retail rather than at wholesale would usually realize the best possible return on the collateral. The view that the secured party should obtain the best possible price for the collateral which he holds is based on the theory that he is a fiduciary with respect to the collateral:

> [I]f the creditor decides to liquidate the collateral, he must act as the debtor's fiduciary in disposing of the assets. *United States v. Terrey*, 554 F.2d 685, 693 (1977).

In *Vic Hansen & Sons, Inc. v. Crowley*, 57 Wis.2d 106, 203 N.W.2d 728, 731 (1973), the Wisconsin Supreme Court held:

> Prior to the enactment of the Uniform Commercial Code in Wisconsin, this court held that the secured party owed a duty to the debtor to use all fair and reasonable means in obtaining the best price for the property on sale. [citations omitted] This duty was not abandoned upon the enactment of the Code. The purpose of the Uniform Commer-

> cial Code is the protection of both the creditor and the debtor. Each party to the transaction has certain duties. The duty of the secured party in this instance was to obtain the best possible price it could obtain for the collateral for the benefit of the debtor.

Similarly, in *Elster's Sales v. El Bodrero Hotel, Inc.*, 250 Cal. App.2d 258, 58 Cal. Rptr. 492, 493 (1967), a California court concluded that:

> [The] policy of the law . . . requires a repossessing seller to resell at the best obtainable price on commercially reasonable terms. [citations omitted] This policy tends to protect a defaulting buyer from any greater loss by way of deficiency judgment than the market reasonably justifies . . .

The secured party's obligation was described as follows in *Foster v. Knutson*, 84 Wn.2d 538, 549, 527 P.2d 1108, 1115 (1974):

> He is required to use his best efforts to sell the collateral for the highest price and to have a reasonable regard for the debtor's interests.

See also, *Credit Bureau Metro, Inc. v. Mims*, 119 Cal. Rptr. 622, 623 (1975) (". . . failure to use 'best efforts' to obtain the highest possible price for the collateral is a breach of the secured party's obligation to act in good faith and in a commercially reasonable manner."); *Luxurest Furniture Manufacturing Co. v. Furniture Warehouse Sales, Inc.*, 132 Ga. App. 661, 209 S.E.2d 63, 65 (1974) (the seller must exercise "due diligence in attempting to get the best price obtainable"); *Dynalectron Corp. v. Jack Richards Aircraft Co.*, 337 F. Supp. 659, 663 (W.D. Okla. 1972) (secured party must use "due diligence" to get the best price); *GMAC v. Elwell*, 7 UCC Rep. Serv. 1074 (N.Y. Civ. Ct. 1970) ("pledgee owes to the debtor the duty of obtaining the best price upon a sale of the pledged chattel," a duty violated by GMAC's sale of the vehicle to itself with no effort to obtain a fair price from any purchasers).

4. Overhead Is Not An Allowable Expense

Section 9-504(1)(a) permits the secured party to charge the defaulting purchaser with:

> the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party. . . .

The UCC does not define the term "reasonable expenses" but complaint counsel argue that common law precedents, incorporated into the UCC by reference, call for the conclusion that the only "reasonable expenses" are out-of-pocket costs and that overhead is not an allowable expense.

Sections 9-207 and 9-504 establish the rights and duties of a secured party with respect to collateral in his possession. Section 9-207, which applies to collateral held before a default, requires the secured party to use reasonable care in the custody and preservation of such collateral, and provides that reasonable expenses incurred by the secured party in caring for and preserving the collateral are chargeable to the debtor and are secured by the collateral unless there is agreement to the contrary.

The draftsman's comments to these two sections indicate that they follow common law precedents. UCC § 9-207, Comment 2; § 9-504, Comment 2. Under the pre-Code pledge law to which these two sections refer, a pledgee was entitled to charge to the debtor only out-of-pocket expenses actually incurred in maintaining and preserving the collateral. The pledgee was not entitled to charge for expenses that would have been incurred regardless of the debtor's default, and it has been held that under the UCC, only reasonable out-of-pocket expenses can be allowed. Professor Grant Gilmore, the original reporter on Article 9, states with respect to the out-of-pocket principle:

> The rule seems to be well-established that only "direct" expenses—the out-of-pocket costs of repossession, storage and the like incurred in connection with the particular goods—can be claimed by the secured party. The courts

> have regularly turned down attempts to include indirect expenses—such as the secured party's general cost of doing business—or to avoid the necessity of proving actual expenses by using the 15 percent formula which is also used in the attorneys' fees clause. 2 Gilmore, *Security Interests in Personal Property*, § 43.5 (1963).

This position is supported by the case law prior to enactment of § 9-504 of the UCC, as well as decisions under the UCC. For example, in *Cherner v. Lawson*, 162 A.2d 492 (D.C. App. 1960), the seller of an automobile sought a deficiency judgment from the defaulting buyer after resale of the repossessed automobile. The deficiency arose largely because the seller claimed as an expense 15 percent of the resale price. That amount was estimated to be a portion of his cost of doing business attributable to the resale of the buyer's car (*i.e.*, overhead). The conditional sales contract under which this deduction was claimed contained a provision which allowed the seller to apply the "expenses of retaking, storing, repairing and selling" against the proceeds of sale. The court stated the issue as:

> Whether a defaulting purchaser may be held liable for claimed expenses of resale when such expenses are not directly attributable to the resale. *Id.* at 493.

The court held that general business and indirect expenses which would have been incurred regardless of whether the resale had taken place could not be charged to the defaulting buyer's account.

> It is a general rule, applicable to sales and conditional sales, that upon resale the vendor is entitled to the costs and expenses directly attributable to repossession and resale, but we have found no authority holding the purchaser liable for general and indirect expenses.
>
> • • •
>
> Cherner's claim that a percentage of its general cost of doing business is chargeable to appellee on resale is essentially the same contention put forth in the above-cited case, i.e., a claim for general business expenses. We hold such expenses are not recoverable. The vendee is liable for direct expenses of resale, such as the salesman's commission which was here allowed; but the vendee is not

> liable for expenses which are incurred incident to doing business and which would have been incurred by the vendor if no default in this particular sale had ever occurred. *Id.* at 493.

In *A to Z Rental, Inc. v. Wilson*, 413 F.2d 899 (10th Cir. 1969), a secured party was allowed to deduct only its direct expenses of obtaining possession of the repossessed collateral and selling it. Expenses incurred in defending against the debtor's counterclaims were denied because they were in the nature of a general business expense. In an earlier case, *Shepherd Tractor & Equipment Co. v. Page*, 158 F.2d 655, 657 (5th Cir. 1947), the buyer and the seller of heavy equipment sued each other over the terms of their contract. The seller resold the equipment to a third party when the buyer refused to perform. He then sought damages from the original buyer. He claimed he was entitled to be compensated for expenses incurred in connection with the resale of the equipment and estimated this as "ten per cent . . . 'That includes my office people, employees that are employed in the sale of equipment and cost of telephone calls'." In holding that the seller was not entitled to deduct overhead, the court stated he could only deduct:

> . . . his reasonable and necessary expenses directly incurred in the resale. These do not include any part of his general business expenses, nor even the time of a salaried employee who made the sales. [158 F.2d at 657].

While a dealer does incur overhead expenses in the resale of a repossessed vehicle (Finding 72), the courts' interpretations of the relevant UCC sections reject the argument that overhead is an allowable expense. Therefore, I find that complaint counsel's repossession charts (Finding 85) properly exclude Francis Ford's overhead expenses.

In conclusion, Francis Ford's failure to calculate and pay surpluses to defaulting customers, despite its acknowledged duty to do so, is without question a violation of Oregon law and that failure is, therefore, a violation of Section 5 of the FTC Act because it offends the public policy expressed in that law. *Sperry & Hutchinson, supra.*

D. Are Francis Ford's Acts Deceptive, Immoral, Fraudulent, Or Injurious To Defaulting Customers?

Francis Ford has withheld surpluses from defaulting purchasers in violation of Oregon law. This alone justifies entry of an order; however, complaint counsel argue that the record establishes that Francis Ford's practices are also violations of the FTC Act because they are immoral, unethical, oppressive, unscrupulous and injurious to defaulting customers. Complaint counsel also urge a finding—apparently to support a potential court proceeding under Section 19 of the FTC Act—that Francis Ford's practices are those which a reasonable person would have known to be dishonest or fraudulent.

Since the 43 defaulting customers whose vehicles were repossessed were without question entitled by state law to the surpluses realized on the resale of those vehicles, Francis Ford's practice of withholding those surpluses is immoral, unethical and unscrupulous.

Complaint counsel also claim that Francis Ford has deceived defaulting customrs by failing to honor the promises made by Ford Credit that surpluses would be paid (Findings 22 and 23). I disagree, for there is no evidence, and I will not indulge in any inference, that defaulting customers originally purchased their vehicles from Francis Ford in reliance upon Ford Credit's promise that, in the unlikely event of a repossession, surpluses would be paid by Francis Ford.

Nor, in the light of the uncontradicted testimony of Francis Ford's expert witnesses (Findings 61-65) can it be said that complaint counsel have proved that defaulting customers were injured by Francis Ford's failure to pay surpluses.

The defaulting customers were entitled to the surpluses pursuant to Oregon law and, in that sense, they were deprived or injured by not receiving what was owed them, but I take it that complaint counsel perceive an economic injury which Francis Ford's acts have caused and which exists independent of state legal obligations.

This theory has been seriously questioned by two knowledgeable witnesses—one of whom was hired by the Commission to advise it with respect to certain credit practices. Both

concluded that Francis Ford's retail facilities and expertise increased the value of the repossessed vehicles and both concluded that the defaulting customers have done nothing which entitle them in an economic sense to the difference between the vehicles' wholesale value and their actual resale price.

Complaint counsel reply that its finance and insurance income compensate Francis Ford for repossession losses (Finding 35) and that it should not be allowed to keep surpluses, but while I agree that complaint counsel's position is legally sound, Francis Ford's finance and insurance income have nothing to do with whether defaulting customers are entitled to the surpluses as a matter of economic logic.*

Thus, while I cannot conclude that the testimony of Professors O'Bannon and Johnson legally justifies the retention of surpluses, I find that it raises serious questions about the alleged substantial injury to defaulting customers, serious enough to require a finding that complaint counsel have not met their burden of proof on this issue.

Whether Francis Ford's practices were those "which a reasonable man would have known under the circumstances was dishonest or fraudulent. . . ." (FTC Act, Section 19(a)(2)), is not an issue which I have the authority to decide. In *Control Data Corp.*, 86 F.C.T. 1093, 1094-95 (1975), the Commission invited the parties to brief two issues, one of which was:

> . . . To what extent, if any should evidence be presented and findings be made [in the administrative proceeding] on the issue whether the challenged acts or practices are such "that a reasonable man would have known under the

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*Ford Credit also receives income from financing, but when it is forced to sell repossessed vehicles, rather than returning them to dealers, it usually realizes no surplus because it disposes of them at wholesale (Finding 59). In such a case, the defaulting customer need not be credited with the retail price, even though the vehicle is undoubtedly later sold at retail. Why then, logically, should a defaulting customer whose vehicle is luckily sold by a retail dealer because of a repurchase obligation be economically entitled to a surplus which is generated by the sale at retail?

circumstances [that they are] dishonest or fraudulent . . ."?

The Commission held in this case that while the roles of the Commission and court to whom the Commission might apply for consumer redress will frequently overlap, "the law judges should not permit the discovery and reception of evidence relevant only to Section 19 issues." *Id.* at 1097. Extending the logic of this decision, if discovery is not permitted with respect to Section 19 issues, then findings are not authorized. The "dishonest or fradulent" issue raised by complaint counsel is related solely to Section 19, for Section 5 liability does not require resolution of these issues, and I can make no findings with respect to them.

E. Summary

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Francis Ford.
2. This proceeding is in the public interest.
3. In the calculation of surpluses or deficiencies on the resale of a repossessed vehicle, the secured party must obtain the best possible price for the vehicle and must credit the defaulting purchaser with the actual resale price of the vehicle.
4. In the calculation of surpluses or deficiencies on the resale of a repossessed vehicle, "reasonable expenses" do not include overhead.
5. Francis Ford has violated the UCC and Oregon law by failing to pay to defaulting customers surpluses realized on the resale of their repossessed vehicles, and that practice is immoral, unethical and unscrupulous.
6. Francis Ford's violation of the UCC and Oregon law is also a violation of Section 5 of the FTC Act.
7. Complaint counsel have failed to establish that Francis Ford's acts and practices are substantially injurious in an economic sense to defaulting purchasers.
8. The entry of the order attached to this decision is in the public interest.

F. Description Of The Order

1. Justification

The order which will be entered in this case incorporates some provisions which are contained in the proposed consent order, agreed to on March 10, 1978, between the Commission and the other parties in this case, Ford and Ford Credit. It requires Francis Ford to cease and desist from failing to pay to defaulting customers surpluses which it realizes on the resale of repossessed vehicles. It also requires Francis Ford to compute surpluses or deficiencies in accordance with a detailed accounting procedure, and orders Francis Ford to determine whether, since 1974, it has realized surpluses on the resale of repossessed vehicles. If it has, Francis Ford must notify those customers to whom surpluses are owed.

The cease and desist provisions of the order are appropriate in this case for they bear a reasonable relationship to Francis Ford's unlawful acts and will prevent them in the future. *FTC* v. *National Lead Co.*, 352 U.S. 419, 428-30 (1957); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611 (1946); *FTC* v. *Colgate Palmolive Co.*, 380 U.S. 374, 394-95 (1965). The affirmative duties imposed upon Francis Ford by the order are justified because they are "needed to fully remedy the violations found or their continuing effects." *Genesco, Inc.*, 89 F.T.C. 451 at 477 (1977).

2. Definitions

Part I of the order contains definitions which are similar to those in the Ford and Ford Credit order. A number of definitions are contained in the order which were not in the notice order and some definitions, such as the one for allowable expenses, have been changed from those in the notice order to clarify the accounting procedure which Francis Ford will be required to use in the future.

The most important definition, the one detailing "allowable expenses" has been adopted because Francis Ford is entitled only to out-of-pocket costs of retaking, reconditioning and reselling repossessed vehicles. A definition of "diligent efforts" has been added to dissipate any uncertainty as to what qualifies as a good faith effort to notify defaulting purchasers.

One term which is referred to differently in this order is the price at which Francis Ford must resell repossessed vehicles. In the Ford and Ford Credit proposed order this price is referred to as the "commercially reasonable price" (Par. II C3) and in this order it is referred to as the "best possible price" (Par. I H). However, this difference has no practical effect. In the Ford and Ford Credit proposed order the "commercially reasonable price" is described as ". . . the best available price." Both orders require the parties to make every reasonable effort to generate the highest possible net return for a customer's account. While disposition at retail by Francis Ford would probably result in the best possible price for the repossessed vehicle in most cases, Francis Ford has sold some repossessed vehicles at wholesale in the past and may do so in the future. The last sentence of the "best possible price" definition proposed by complaint counsel recognizes this possibility and requires Francis Ford to maintain documents which show that disposition at other than retail was reasonable. I have not, however, adopted the second sentence of the definition which reads:

> As a retail dealer in used cars, respondent's dispositions of repossessed vehicles shall normally be by retail sale to an independent third party for the best possible price.

I have stricken this sentence because I do not believe Francis Ford should be ordered to dispose of repossessed vehicles "normally by retail sale" for this suggests that wholesale sales by Francis Ford would usually be commercially unreasonable while the following sentence recognizes that such dispositions would be proper so long as Francis Ford could establish that those dispositions resulted in the best possible price. *

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*See Vic Hansen & Sons, Inc., *supra*, at 733: "There is no requirement or prohibition that the secured party sell at, 'wholesale' or 'retail.' All that is required is the best possible price under the circumstances."

3. Substantive Provisions

Part II of the order mandates the specific notification and payment steps which Francis Ford must take to ensure that defaulting customers will receive surpluses. It requires that surpluses be paid within 45 days of the resale ** and directs that an accounting statement accompany the payment (II A and B). Other provisions prohibit Francis Ford from failing to dispose of repossessed vehicles in a manner designed to obtain the best possible price (II C) and from failing to apply for rebates or credits owed the customer (II D).

Paragraph II E (II F in complaint counsel's proposed order) prohibits Francis Ford from obtaining from its customers a waiver of the customers' right to a refund of a surplus. This prohibition, which is also included in the Ford and Ford Credit proposed order, is necessary to foreclose an avenue by which Francis Ford might circumvent its responsibilities under the order:

> In carrying out this function [of preventing illegal practices in the future] the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. *FTC* v. *Ruberoid, Co.*, 343 U.S. 470, 473 (1952).

Thus, even though the UCC (§ 9-505) and state law (ORS 79.5050) might permit such waivers, I believe that this right can be denied to Francis Ford because it may abuse that right. *

**The period specified for surplus payments in California's motor vehicle law. Cal. Civ. Code § 2983.2(c).

*Compared *Spiegel Inc.*, v. *FTC*, 540 F.2d 287 (7th Cir. 1976). Here, citing *FTC* v. *Sperry & Hutchinson, supra*, the Seventh Circuit found that the Supreme Court "left no doubt that the FTC had the authority to prohibit conduct that, although legally proper, was unfair to the public." *Id.* at 292.

One provision sought by complaint counsel which I have not ordered is that Francis Ford include in its installment credit instruments a statement to the effect that:

a. no expenses other than reasonable expenses incurred as a direct result of repossessing (including any legally permissible attorney's fees and court costs), holding, preparing for sale and selling the vehicle may be deducted from the proceeds in determining a surplus or deficiency; and

b. any surplus realized on the resale or other disposition of the vehicle is to be paid to the customer. (II E in complaint counsel's proposal).

Because Francis Ford will be required by other order provisions to inform all defaulting customers of their rights to surpluses, I see no need to require it to tell all of its customers of the existence of such rights in the event of a default.

Paragraph II F (II G in complaint counsel's proposed order) is necessary because Francis Ford may, since it will be required to pay surpluses, also decide to collect deficiencies. In view of Francis Ford's past illegal acts, a prohibition on the collection of excess deficiencies is, I believe, appropriate. See *FTC* v. *National Lead Co.*, *supra* at 431: "[T]hose caught violating the Act must expect some fencing in."

According to the staff's description of the Ford-Ford Credit order, Ford's "owned" dealerships will be required to pay surpluses realized on vehicles repossessed as far back as 1974. Other dealers will be sent bulletins "urging" them to pay surpluses on past repossessions but they cannot be required to do so.

Complaint counsel's proposed order would require Francis Ford to identify unpaid surpluses back to June 25, 1971 (III A), to inform credit reporting agencies about customers incorrectly reported as owing a deficiency (III B), to locate and notify defaulting customers of those surpluses (III C and D) and to pay to those customers surpluses arising subsequent to February 10, 1973 (III E).

Complaint counsel do not explain why Francis Ford should be required to compute surpluses as far back as 1971 when

other Ford dealers need not do so. Therefore, I have changed III A to require the identification of surpluses back to May 1, 1974.

I have adopted proposed paragraphs III B, C and D. However, I am deleting part III E from the Francis Ford order.

Complaint counsel argue that part III E is justified because the Commission has, despite the decision in *Heater* v. *FTC*, 503 F.2d 321 (9th Cir. 1974), consistently held that it has the power under Section 5 of the FTC Act to order restitution. *Curtis Publishing Co.*, 78 FTC 1472, 1514-17 (1971); *Credit Card Service Corp.*, 82 FTC 191, 207-08 (1973); *Universal Credit Acceptance Corp.*, 82 FTC 570, 650-52, 656-57, 666-68 (1973); *Holiday Magic, Inc.*, 85 FTC 90 (1975), and *Genesco, Inc.*, 89 FTC 451, 478 (1977).

While I may have the power to order restitution, * complaint counsel have not convinced me that it is justified in this case. The notice order did inform Francis Ford that the Commission might seek consumer redress, but only under Section 19 of the FTC Act. This section of the Act would require the Commission, assuming that it enters an order in this case, to apply to a district court for redress.

Despite the fact that the Commission fought so vigorously for the passage of Section 19, the staff of the Seattle Regional Office apparently believes that the procedures it dictates are so cumbersome that it should not be used: "[I]t is only sound judicial administration to raise this issue [restitution] within the administrative proceeding so as to avoid burdening both Francis Ford and the Commission with a subsequent proceeding in District Court under Section 19(a)(2)" (Complaint counsel's conclusions of law, p. 34).

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*One might even argue that requiring the payment of surpluses is not restitution, for in *Genesco, supra* at 478, it was held that although the order required respondent to honor refund requests:

> A thorough reading of the order entered herewith discloses that restitution, although proper, has not been ordered.

Nevertheless, complaint counsel view their proposal as requiring restitution, and I will deal with it on that basis.

The Commission was well aware of the potential complexities of a Section 19 proceeding as opposed to Section 5 restitution when it issued this complaint, and as far as I am concerned, the statement that it might apply to the courts for consumer redress under Section 19 forecloses complaint counsel's last minute change of theory.

Furthermore, while the Commission disagrees with the *Heater* decision and can press its contrary views on restitution in other circuits, it is, in my opinion, bound by that decision with respect to activities occurring within the jurisdiction of the Ninth Circuit. Since Francies Ford is located in Oregon, I do not believe that I have the authority to order restitution.

Part IV requires that for at least three years Francis Ford maintain records pertaining to its compliance with the order. Recordkeeping provisions in Commission orders, designed to augment compliance checks, are necessary and proper. *Geneseo Inc.*, *supra* at 479. Parts V and VI contain provisions which are standard in all Commission orders.

ORDER

I. IT IS ORDERED that for purposes of this Order the following definitions shall apply:

A. "Respondent" means Francis Ford, Inc., a corporation, and its successors and assigns. It does not include Ford Motor Company nor Ford Motor Credit Company.

B. "Vehicle" means an automobile or truck and any and all parts, accessories, and appurtenances repossessed therewith. A van is deemed a "truck."

C. "Adjusted balance" means the unpaid balance as of the date of repossession (1) less applicable finance charge and insurance premium rebates, (2) less all amounts received for collision insurance claim payments except those for which the corresponding vehicle damage is repaired, and plus (3) other charges authorized by contract or law and actually assessed prior to repossession.

D. "Proceeds" means whatever is received by respondent upon its disposition of a repossessed vehicle, excluding

finance charges, sales taxes, separately priced warranties and service contracts insofar as the charges therefor are itemized in documents provided at that time to the party to whom disposition is made. Any underallowance realized on the disposition shall be included. The amount of any lawful overallowance given on such a disposition may be deducted if (1) the amount so deducted was determined at the time of the disposition and is no greater than the excess of the trade-in allowance over the wholesale value of the vehicle taken in trade on the repossessed vehicle as that value is shown in a current recognized guidebook used in the area, (2) overallowances are given and contemporaneously recorded in the normal course of respondent's sales or leases of non-repossessed vehicles, and (3) correctly determined underallowance are included in the proceeds of other repossessed vehicle dispositions wherever applicable.

E. "Allowable expenses" means actual out-of-pocket expenses incurred by respondent as a direct result of a repossession. The expenses must be reasonable and result directly from the repossessing, holding, preparing for sale or reselling of the vehicle, and be not otherwise reimbursed to respondent nor prohibited by contract. They are limited to the following charges (insofar as permitted by state law) and no others:

1. amounts paid to persons who are not employees of respondent nor of a financing institution which financed the prior sale, for repcssessing, towing or transporting the vehicle;

2. filing fees, court costs, cost of bonds, fees and expenses paid to a sheriff or similar officer, and fees and expenses paid to an attorney who is not an employee of respondent nor of the financing institution, for obtaining possession of or title to the vehicle;

3. fees paid to others to register or obtain title to or legally required inspection of the vehicle;

4. amounts paid to others for storage (excluding charges for storage at facilities owned or operated by respondent);

5. labor and associated parts and supplies furnished by respondent for the repair or reconditioning of the vehicle in preparation for resale, computed at the following cost rates:

a. The cost rate for labor of mechanical technicians employed in respondent's retail repair shop (for mechanical work) or for body-paint technicians employed in respondent's retail body shop (for body work) shall be based on actual time spent on the vehicle and may not exceed the greater of:

(i) the sum of respondent's average hourly base rate for that category of technicians (mechanical, body-paint, or heavy truck) plus 20 percent of that average hourly base rate to cover fringe benefits, provided that such data is reflected in a file identifiable with that vehicle, or

(ii) the sum of the average hourly base rate for that category of technicians plus the average annual hourly cost for voluntary and legislated fringe benefits for that category of technicians computed in accordance with the "long form" Warranty Labor Rate Request (Ford Form FCS 9716, April 1978) (Attachment A hereto), provided that such data is reflected in a file identifiable with that vehicle;

b The cost rate for labor for other reconditioning, clean-up and preparation work performed by employees of respondent shall be based on actual time spent on the vehicle and may not exceed the base hourly wage rate for the employees involved plus 20 percent of their base hourly wage rate to cover fringe benefits, provided that such data is reflected in a file identifiable with that vehicle;

c The cost rate for parts shall not exceed respondent's cost for the parts used as listed in the current manufacturer's catalogue.

Provided, however, that if the amount of respondent's payoff to the financing institution is reduced because of insured collision damage, or if respondent receives any payment for collision damage or

warranty work, then the corresponding vehicle work performed shall not be an allowable expense, but if a payoff adjustment is for uninsured collision damage, the corresponding vehicle work performed shall be deemed an allowable expense.

6. amounts paid to others for labor and associated parts and supplies purchased for the repair or reconditioning of the vehicle in preparation for resale;

7. sales commissions paid for actual participation in the sale of the particular vehicle, computed at a rate no higher than for a similar, non-repossessed vehicle, but excluding all portions of commissions attributable to the selling of service contracts, warranties, financing or insurance;

8. a proportionate share of expenditures for advertisements which specifically mention the particular vehicle;

9. fees and expenses paid to others for auctioning the vehicle;

10. expenses for telephone calls and postage incurred in arranging for the repossession, holding, transportation, reconditioning or resale of the vehicle; and

11. amounts respondent was contractually required to pay and did pay to reimburse the financing institution to which payoff was made, for expenses such as repossession of the vehicle or allowance for uninsured collision damage, if such expenses were not included in the payoff.

F. "Surplus" means the excess of (1) the proceeds plus any applicable rebates or credits not deducted by the financing institution, over (2) the adjusted balance, allowable expenses, and amounts paid to discharge any other security interest provided for by law. A negative (minus) amount produced by such calculation is referred to herein as a "deficiency."

G. "Diligent efforts" means that in any case where the full surplus or disclosure is not actually received by the defaulting customer within the specified time frame, respondent's efforts to effectuate such payment and/or disclosure shall meet at least the following criteria: The payment and/or disclosure

are to be sent by regular mail within the specified time frame to the customer's last residence address known to respondent or available from the financing institution, with the face of the envelope (1) showing respondent's name and return address and (2) indicating that it is to be forwarded and that if there is no forwarding address it is to be returned to the sender. If the envelope is returned undelivered, the payment and/or disclosure are to be sent to the most recent of the following known addresses: the last employment address known to respondent or available from the financing institution; the address provided by the military locator service (if applicable); or the address of a co-signer, relative or other person through whom the customer may be reached. If an insurance rebate or other credit is received after a surplus payment has been sent, a further payment in the additional amount is to be sent in the same manner within 45 days of respondent's disposition of the vehicle or within 10 days of receiving the rebate, whichever is later. If such a rebate is received after a prior computation had indicated there was no surplus, a second computation is to be made and any surplus sent in the same manner and within the same time limit.

H. "Best possible price" means that respondent will exercise every reasonable effort to market the vehicle for the highest possible net return for the debtor's account (in terms of proceeds less allowable expenses). For each disposition of a repossessed vehicle by respondent other than by retail sale, respondent shall retain contemporaneous documentation showing with specificity that such manner of disposition could reasonably be expected to produce a greater net return for the debtor's account than would retail sale.

II. IT IS FURTHER ORDERED that respondent and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the extension and enforcement of motor vehicle retail credit obligations, and in connection with the disposition of repossessed motor vehicles, in or affecting com-

merce (as "commerce" is defined in the Federal Trade Commission Act, as amended), do forthwith cease and desist from:

A. Failing to determine the following information and to disclose or make diligent efforts to disclose such information to the defaulting customer in substantially the manner indicated on Attachment B hereto, "Resale of a Repossessed Vehicle," within forty-five (45) days of respondent's disposition of a repossessed vehicle:

1. the date, place and manner of disposition;

2. the adjusted balance, itemized to reflect the unpaid balance and all rebates and other adjustments thereto;

3. the proceeds and allowable expenses, itemized and excluding all expenses other than allowable expenses;

4. the amount of surplus or deficiency.

Provided that such disclosures need be not made where respondent can establish that no surplus resulted from the disposition, unless an attempt is made to collect a deficiency from the defaulting customer or from his or her successors or assigns.

B. Failing to pay or make diligent efforts to pay each surplus in full to the defaulting customer or to his or her successors or assigns, accompanied by disclosures as required by Paragraph II A above, within forty-five (45) days of respondent's disposition of the vehicle.

C. Failing to dispose of any repossessed vehicle in a manner designed to obtain the best possible price.

D. Failing to apply promptly for any rebate or credit owing to the defaulting customer's account.

E. Taking any action to obtain or attempt to obtain or bring about a waiver of a customer's right to a refund of surplus, including such waivers as may arise from failure to object to a proposal to retain the vehicle.

F. Collecting or attempting to collect from a defaulting customer or from his or her successors or assigns, by

any means, a deficiency in excess of either the amount (1) permissible under applicable state or federal law, or (2) the amount determined in accordance with the definitions set forth in Part I of this Order,

PROVIDED that no customer's waiver of rights or failure to object to any secured party's proposal to retain the repossessed vehicle shall limit respondent's obligations under this Order to account for and pay any surplus.

III. IT IS FURTHER ORDERED that respondent:

A. Proceed immediately to identify, back to May 1, 1974, the existence and amount of each unpaid surplus arising from respondent's dispositions of repossessed vehicles in which respondent held or acquired a security interest or the rights or duties of a secured party at or after default. This identification shall be completed within ninety (90) days of the effective date of this Order.

B. For each defaulting customer entitled to a surplus identified under Paragraph III A above but previously reported to a credit reporting agency by respondent or a representative of respondent as owing a deficiency, advise the credit reporting agency of the correct facts within 120 days of the effective date of this Order.

C. Endeavor in good faith, through contacts with credit reporting agencies, state licensing and employment offices, and other reasonably accessible research sources and records (including published directories), to locate each defaulting customer entitled to a surplus identified under Paragraph III A above, or the successors or assigns of such customers with respect to their surplus rights.

D. Disclose or make diligent efforts to disclose in writing to each defaulting customer, successor or assign located pursuant to Paragraph III C above, within 150 days of the effective date of this Order: (1) the same items of information specified in Paragraph II A of this Order, and (2) in clear lay language, in substantially the form indicated on Attachment C here-

to, "Notification Letter," the rights and remedies of such customer, successor or assign under applicable state law and under this Order.

IV. IT IS FURTHER ORDERED that respondent maintain the following records relating to each repossessed vehicle returned to respondent:

A. Records of payment and of efforts to disclose and pay surpluses and locate defaulting customers entitled thereto under Parts II and III of this Order, including but not limited to canceled checks, returned envelopes and copies of disclosures and other communications (showing dates and manner of mailing).

B. Business records underlying each item specified in Paragraph II A of this Order, including but not limited to payroll records and warranty labor rate forms pertinent to determinations of "cost rates" of labor under Paragraph I E 5 of this Order.

C. Such other records as the Commission may determine to be useful for efficient monitoring of compliance with this Order.

Each such record shall be retained by respondent for at least three years and shall be available for inspection and copying by authorized representatives of the Commission.

V. IT IS FURTHER ORDERED that respondent shall forthwith deliver a copy of this Order to each of its operating departments, divisions and related business enterprises, and applicable provisions thereof to all present and future personnel of respondent engaged in the sale or offering for sale of motor vehicles and/or in the consummation of any extension of consumer credit or in bookkeeping, accounting or recordkeeping for respondent; and that respondent secure from each such person a signed statement acknowledging receipt of the Order or provisions.

VI. IT IS FURTHER ORDERED that:

A. Respondent shall, within sixty (60) days after service of this Order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this Order.

B. Respondent shall, within one hundred eighty (180) days after the effective date of this Order, submit to the Commission a report demonstrating respondent's compliance with Part III of this Order, including the number of repossessions and surpluses identified, together with a detailed description of respondent's manner of identifying and attempting to disclose such surpluses and of locating and attempting to locate defaulting customers entitled thereto.

C. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation and dissolution of subsidiaries, or any other corporate change which may affect compliance obligations arising out of this Order.

LEWIS F. PARKER
Administrative Law Judge

January 3, 1979

Warranty Labor Rate Request – Standard Form

WARRANTY LABOR RATE POLICY

100% of the dealer's hourly cost for the following fringe benefits for those productive technicians.

- Paid Vacations
- Pay in Lieu of Vacation
- Holiday Pay
- Sick Pay
- Dealer's Portion of:
  - Hospital/Dental Ins.
  - Retirement/Pension Plan
  - Uniforms and Laundry
  - Group Life Insurance
- F.I.C.A. (Social Security)
- Federal Unemployment Compensation
- State Unemployment Compensation
- Worker's Compensation Insurance
- Other Special Legislated Benefits
- Fringe benefits that are union negotiated and part of a dealer's local union contract, except fringe benefits relating to established flat rate times issued by Ford.

Items not recognized as allowable fringe benefits include technician training expense and any dealer incentive program for service personnel.

1335

INSTRUCTIONS FOR COMPLETING WAGE DATA AND FRINGE BENEFIT WORK SHEETS – Pages 2 and 3

ENTER THE FOLLOWING:

COLUMN A – General job classification of each technician using appropriate code (M-Mechanical, BP-Body-Paint and HT-Heavy Truck). If calculating separate rates for each group, leave at least two lines between each group for group totals.

COLUMN B – Productive line technicians including new car conditioning employees. Do not include supervision, service writers, apprentices, dispatchers, porters, lube or wash rack employees.

COLUMN C – Technicians' Social Security Number.

COLUMN D – Date technician employed at your dealership.

COLUMN E – Technicians' hourly base pay rate. If paid on a percentage pay plan, enter his hourly rate based on the percentage split of your stated retail customer labor rate.

COLUMN F – Technicians' pay plan. (S-Salary, H-Hourly, FRH-Flat Rate Hourly, 50/50 Percentage Split, O-Other – Explain).

COLUMN G – Technicians' "Gross Earnings" during the last three calendar months.

COLUMN H – Actual hours the technician worked during the last three calendar months.

COLUMN I – Technicians' normal attendance hours in a work week.

COLUMN J – Number of days and the annual cost of vacation obligations your dealership incurs for the technicians. Include any pay in lieu of vacation.

COLUMN K – Number of days and annual cost to your dealership of those holidays recognized by your dealership.

COLUMN L — Number of sick days and the annual cost which your dealership pays to each technician. If covered by an insurance policy, show cost of insurance premium. If obligation is variable and based on actual sick days, use previous twelve months expense.

COLUMN M — Annual dealership cost of hospital and dental insurance premiums extended to each technician.

COLUMN N — Annual dealership cost of any life insurance program extended to each technician.

COLUMN O — Annual dealership cost of retirement/pension benefits extended to each technician. Include Profit Sharing Plans only if payable upon retirement and administered by a trustee.

COLUMN P — Annual dealership costs of uniforms or laundry service furnished each technician.

COLUMN Q — Annual dealership costs of any other applicable union contract or voluntary fringe benefits not previously listed. Attach supporting documents for any such costs.

COLUMN R — Total voluntary fringe benefit costs for each technician (Column J through Q).

COLUMN S — Annual dealership costs of F.I.C.A. (social security) paid for each technician. This is the dealership cost portion of U.S. Government Form 941, "Employer's Quarterly Federal Tax Return".

COLUMN T — Annual dealership costs of federal unemployment compensation paid for each technician as reported on U.S. Government Form 940, "Employer's Annual Federal Unemployment Tax Return".

COLUMN U — Annual dealership costs of state unemployment compensation paid for each technician as reported on the applicable state reporting form.

COLUMN V — Annual dealership costs of Workman's Compensation insurance paid for each technician.

COLUMN W — Annual dealership costs of any other legislated fringe benefits paid for each technician that results in direct costs to your dealership (i.e., state disability tax is applicable in selected states).

COLUMN X — Total legislated fringe benefit costs for each technician (Column S through W).

1348

EXAMPLE COMPUTATION FOR LINE 8 OF BASIC CALCULATION

Average Normal Work Hours Per Week	40
Multiplied by 52 Weeks	2080
Less Legal Holidays Multiplied by 8 Hours	48
Equals Average Normal Work Hours Per Year	2032

WAGE DATA

FOLLOW INSTRUCTIONS LISTED ON PAGE 1 IN COMPLETING THIS FORM

LIST DEALER PORTION OF COST FOR VOLUNTARY FRINGE BENEFITS (Round to Nearest 4¢)

FRINGE BENEFIT DATA

FEDERAL AND STATE LEGISLATED FRINGE (Round to Nearest Dollar)

A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X
Check	Technician's Name	Social Security Number	Base Rate	Weekly Total Base Rate	Fee Rate	Gross Earnings (Cols. D & E)	Actual Hours Worked (Col. D ÷ Col. C)	Normal Weekly Work Hours	VACATION		HOLIDAY		SICK PAY ACT. SAVE PAID		Hospital/ Medical Insurance	Life Insurance	Retirement Annuity	Dismissal Severance Annuity	Other (Specify) Annuity	Total Annuity (Cols. M thru Q)	F.I.C.A. (Social Security)	Federal Unemployment	State Unemployment	Worker's Comp. Insurance	Other (Specify) Insurance	Total Insurance (Cols. S thru W)
									No. Days	Annual Cost	No. Days	Annual Cost	No. Days	Annual Cost											

ATTACHMENT B

RESALE OF A REPOSSESSED VEHICLE

ORIGINAL CUSTOMER

Name: _____
Address: _____
Zip _____

Second address (if available): _____
City/state _____
_____ Zip _____

RESALE CUSTOMER

Name: _____
Address: _____
City/State: _____
_____ Zip _____
Date resold: _____
Place of sale: _____
Manner of sale: _____

FINANCING INSTITUTION DATA

Name: _____
Location: _____

LOAN PAY-OFF

Amount: $ _____ Check No. _____

1368

SURPLUS OR (DEFICIENCY) ON RESALE OF A REPOSSESSED VEHICLE		Amount	Amount
1. Selling Price	Selling Price	$	
	Trade-in adjustment: Overallowance	$( )	
	Underallowance	$	$
2. Loan Pay-Off	Loan Pay-Off to Financial Institution	$	
	Less: Insurance Premium Rebates Received	$( )	
	Less: Collision Insurance Claim Pmt. Rcv'd	$( )	$

4. Item 1, Less Item 2 - No further calculation is required if this figure is negative unless a deficiency is sought. $____

6. Allowable Expenses

a. Dealer repo exp.	$ ____	f. Reconditioning	$ ____		
b. Legal costs	$ ____	(By others)	$ ____		
c. Title & reg. fees	$ ____	g. Sales Comm.	$ ____		
d. Storage	$ ____	h. Advertising	$ ____		
e. Reconditioning		i. Auction fees & expenses	$ ____		
(By Dealer)		j. Postage/Tel.	$ ____		
Rate ___ Hours __	$ ____	Total	$ ____	$____	
Rate ___ Hours __	$ ____				
Rate ___ Hours __	$ ____				
Parts	$ ____				

137a

5. Item 3 less Item 4 - No further calculation is required if this figure is negative unless a deficiency is sought. $____

6. Less Reimbursement to Financing Institution for Repossession Expenses $

7. Less Other Liens $

8. Surplus owing to original customer - TO BE REFUNDED $

CUSTOMER REFUND Amt. $ Ck. No. Date

Vehicle Description Year Make Model Stock No. Serial No.

[ ] No expenses other than allowable expenses have been deducted in computing a surplus or deficiency.

CERTIFICATION

I hereby certify that (1) the vehicle was sold in a commercially reasonable fashion and (2) the above computation of surplus or deficiency on the sale of a repossessed vehicle is accurate

and (3) any surplus indicated herein has been paid (unless reasonable efforts to locate the original customer have proven unsuccessful).

Dealership Name

Signature

Title

City

State

Dealer Number

1388

ATTACHMENT C

Notification Letter

Dear _____:

On *(insert date of resale)* we resold the *(insert year/make/model of vehicle)* that was repossessed from you on or about *(insert date of repossession)*.

The resale price of your vehicle minus the amount of your debt and our expenses left a balance of *(insert amount of surplus)*. The enclosed form shows how we calculated it. WE OWE THIS MONEY TO YOU. STATE LAW AND AN ORDER OF THE FEDERAL TRADE COMMISSION REQUIRE THAT WE PAY THIS MONEY TO YOU. ALL YOU NEED TO DO IS ASK FOR IT.

If you want us to send this money to you, please say so on the enclosed carbon copy of this letter. Also, tell us where we should send the money. Please return this information in the enclosed stamped and self-addressed envelope. We will then send the money to you.

Because we are late in advising you of this money we owe you, you may have a right to sue us under state law for penalties.

SIGNED

_____

(Francis Ford, Inc.)

Please send the money you owe me.

_____

Customer

_____

Customer's Address

APPENDIX G

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, provides:

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 18(f)(3), common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce. [6]

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in per-

son. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine

whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the

Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code. [7]

Section 19 of the Federal Trade Commission Act, 15 U.S.C. 57b, provides:

(a)(1) If any person, partnership, or corporation violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 5(a)), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 5(a)(1)) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

Nature of relief available

(b) The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to

redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1114

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRANCIS FORD, INC.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Statement	2-3
Reasons Why The Writ Should Be Denied	3-10
Appendix A	1a-2a

TABLE OF AUTHORITIES

Cases:

FTC v. American Tobacco Co., 274 US 543, 544 (1927)	4
FTC v. Standard Oil Co., 355 US 396, 400-401 (1958)	4
NLRB v. Bell Aerospace Co., 416 US 267, 294 (1974)	3,5,6,7
NLRB v. Wyman-Gordon Co., 394 US 759, 764 (1960)	6,7
Patel v. INS, 638 F2d 1199 (9th Cir. 1980)	5
SEC v. Chenery Corp., 332 US 194, 202 (1947)	8

Statutes and Regulations:

Administrative Procedure Act	
5 U.S.C. §551(4)	7
5 U.S.C. §553	6
5 U.S.C. §706(2)(A)	9
Federal Trade Commission Act	
15 U.S.C. 45(m)(1)(B)	7
15 U.S.C. 57a	7

Page

Uniform Commercial Code
Article 9 3
§9-504 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1114

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRANCIS FORD, INC.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Francis Ford, Inc., respectfully requests that this Court deny the Federal Trade Commission's ("Commission") petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The opinion of the court of appeals is reported at 673 F.2d 1008, but for the convenience of the Court, citations to the opinion will be made to the

Commission's Appendix A.

STATEMENT

Respondent does not accept the Commission's statement of the case. The opinion of the court of appeals contains an accurate statement of the factual and procedural history of this case. Petition, App. A, at 1a-2a. The court of appeals statement is far more reliable than the statement of the Commission, which contains the same kinds of dramatic accusations and misstatements of the law concerning U.C.C. § 9-504, that has marked the Commission's approach throughout this case.

In contrast to other rulemaking versus adjudication cases that have come before this Court, in this case, the Commission had commenced rulemaking proceedings that covered the practices involved in the adjudication. Petition, App. A, at 2a, 4a-5a. The practices

involved are not exclusively regulated by the Commission under federal law, but are governed by state law, Article 9 of the Uniform Commercial Code [Ore. Rev. Stat. ch. 79]. Finally, the remedy sought was not a single cease and desist order, but was a comprehensive commercial accounting scheme to be applied nationally. Commission's Order, Petition, App. D., at 54a-56a; App. E. at 58a-73a.

REASONS WHY THE WRIT SHOULD BE DENIED

This Court has repeatedly held that the decision whether an agency must proceed by adjudication or rulemaking is, in the first instance, entrusted to agency discretion. This Court has held that there may be instances where agencies will abuse that discretion, NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974), but has not specified an exact standard to determine where an abuse lies, and has left this

determination to be made on a case by case basis.

This is exactly what the court of appeals has done in this case. It looked at all of the facts present, weighed these facts, and determined that the Commission abused its discretion.

This fact-weighing process, as this Court has also recognized, is one of the important functions served by the court of appeals in the administrative process, and it is inappropriate and unnecessary for this Court to review those kinds of determinations. FTC v. Standard Oil Co., 355 U.S. 396, 400-401 (1958). In FTC v. American Tobacco Co., 274 U.S. 543 (1927), this Court said:

> Proper decision of the controversy depends upon a question of fact. ...
>
> It now appears to us that this matter of fact is of no general importance. Accordingly, we adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations. 355 U.S. at 544.

In its petition, the Commission has taken a portion of one sentence out of context from the court of appeals opinion, and then argued that the court of appeals misstated law. This sentence is:

> The thrust of the Patel holding, therefore, is that agencies can proceed by adjudication to enforce discrete violations of existing laws where the effective scope of the rule's impact will be relatively small; but an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application. Petition, Appendix A, at 3a.

First, this sentence is dicta. It merely describes the thrust of the holding of another Ninth Circuit decision, Patel v. INS, 638 F.2d 1199 (9th Cir. 1980). It is in no sense determinative of the outcome of the court of appeals decision in this case.

Second, this sentence is not an incorrect statement of law. The language quoted by the Commission from NLRB v. Bell Aerospace Co., 416

U.S. 267, 294 (1974), is to the effect that an agency may announce "new principles," not that it can change existing law, and establish rules of widespread application without going through the rulemaking procedures required by the Administrative Procedure Act, 5 U.S.C. § 553. In NLRB v. Wyman-Gordon Co., 394 U.S. 759, (1969), this Court said:

> The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. [Citation omitted.] They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention. [Emphasis added.] 394 U.S. at 764.

Bell Aerospace also suggests that where the rule changes existing law and where the rule will have widespread application, rulemaking would be appropriate. 416 U.S. at 294-95.

Finally, the Commission cannot deny that the general applicability of the rule is an

important fact to be considered in determining whether an agency should proceed by adjudication or by rulemaking. In addition to Bell Aerospace, 416 U.S. at 294, this is supported by the applicable statute defining a "rule," section 2(c) of the Administrative Procedure Act, as amended, 5 U.S.C. § 551(4) (quoted in App. A). NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (quoted supra).

The Commission also argues that Section 205 of the FTC Improvement Act, 15 U.S.C. 45(m)(1)(B) (quoted in App. A to this brief), permits it to establish rules through adjudication. Petition, at 13-14. Section 205 should not be read as a device for circumventing the proper rulemaking procedures. Section 205 was enacted at the same time as Section 202 of the FTC Improvement Act, 15 U.S.C. 57a, which for the first time expressly granted the Commission rulemaking powers. Now that the Commission has rulemaking powers, it should use

them, just as it started to do in this case. Court of Appeals Opinion, Petition, App. A, at 2a, 4a-5a. SEC v. Chenery Corp., 332 U.S. 194, 202 (1947):

> Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct .... The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.

Section 205 should only be used where the Commission is dealing with a discreet violation, and not as a means of promulgating an entire commercial accounting scheme. Commission's Order, Petition, App. E, at 58a-73a. To do otherwise is to permit an abuse of the procedure set forth in Section 205 and an end run around the appropriate rulemaking procedures. As one commentator noted:

> For example, it would seem entirely possible under Section 205, but in my opinion, clearly inappropriate, for the

> Commission to seek out a small, especially vulnerable, business to develop a new principle of black letter law under the FTC Act as a means of obtaining a precedent which can, under Section 205, be applied throughout the industry. This would clearly frustrate the Congressional purpose in giving the Commission general rulemaking powers to be exercised through designated, and carefully designed, rulemaking procedures.
> Remarks of Caswell O. Hobbs, III, 45 ABA Antitrust L.J. 103, 115 (1976).

The only other notable argument made by the Commission is that the court of appeals did not say that the Commission abused its discretion, but that the Commission had "exceeded its authority." Petition, Appendix A, at 5a. It should go without saying that when an agency abuses its administrative discretion, it exceeds its authority. Section 10(e) of the Administrative Procedure Act, as amended, 5 U.S.C. § 706(2)(A).

For the foregoing reasons, the

Commission's petition should be denied.

DATED this 10 day of September, 1982.

Respectfully submitted,

ESLER & SCHNEIDER

Michael J. Esler

APPENDIX A

Section 2(c) of the Administrative Procedure Act, 5 U.S.C. 551(4), provides:

> "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing; ... .

Section 205 of the FTC Improvement Act (1975), 5 U.S.C. 45(m)(1)(A) and (B) provides:

> (A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of

subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice --

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

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No. 82-24

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRANCIS FORD, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

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TABLE OF AUTHORITIES

Page

Cases:

County of Los Angeles v. *Davis*, 440 U.S. 625 2

DeFunis v. *Odegaard*, 416 U.S. 312 2

Duke Power Co. v. *Greenwood*, 299 U.S. 259 2

Great Western Sugar Co. v. *Nelson*, 442 U.S. 92 2

NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 3

NLRB v. *Wyman-Gordon Co.*, 394 U.S. 759 3

Preiser v. *Newkirk*, 422 U.S. 395 2

SEC v. *Chenery Corp.*, 332 U.S. 194 3

United States v. *Allied Publishers Service Inc.*, No. CV-F-81-46 (E.D. Cal. Aug. 10, 1982) 6

United States v. *Braswell, Inc.*, [1981-82] Trade Cas. para. 64,325 (N.D. Ga.), aff'd, No. 81-9666 (11th Cir. Mar. 3, 1982) 6

United States v. *Concentrated Phosphate Export Association*, 393 U.S. 199 1

United States v. *Munsingwear*, 340 U.S. 36 2

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 5

Page

Statutes and regulations:

Federal Trade Commission Act, 15 U.S.C. (& Supp. IV) 41 *et seq.* :

Section 5, 15 U.S.C. (& Supp. IV) 45 ..... 5, 6, 7

Section 5(m)(1)(B), 15 U.S.C. 45(m)(1)(B) 3, 5, 6

Section 18, 15 U.S.C. (& Supp. IV) 57a 4

Section 19, 15 U.S.C. 57b 7

Section 19(a)(2), 15 U.S.C. 57b(a)(2) 6

16 C.F.R. 3.25(c) 4

16 C.F.R. 3.25(d) 4

40 Fed. Reg. 16347 (1975) 6

In the Supreme Court of the United States

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FEDERAL TRADE COMMISSION, PETITIONER

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REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

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1. Amicus curiae National Automobile Dealers Association ("NADA") has suggested in its Brief in Opposition that this case is moot (Br. at 15-16). Francis Ford, Inc., however, has not made such a suggestion, nor in any way addressed this matter.

If Francis Ford, Inc., is insolvent, and there is no realistic possibility that either it or a successor corporation will resume the sale of automobiles, then this case would be moot. Since "the allegedly wrongful behavior could not reasonably be expected to recur," *United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199, 203 (1968), the Commission's order, if affirmed, could have no operative effect. Nor could the Commission obtain redress for consumers from whom surpluses have been unlawfully withheld in the past.

The Commission is reluctant to acquiesce in a suggestion of mootness absent confirmation by Francis Ford, Inc., which is in the best position to know its current business status. Our informal inquiry, however, suggests that, indeed, this case may be moot. We have been advised that although the corporation continues to exist and is not in bankruptcy or reorganization, its assets have been seized by creditors, and Ford Motor Co. has cancelled the Sales and Service Agreement pursuant to which respondent had been authorized to sell new Ford automobiles. While Francis Ford, Inc., could reacquire the right to sell new automobiles made by Ford or another manufacturer, or become a used car dealer, we have no information concerning these possibilities.

If this case has become moot, the judgment of the court of appeals should be vacated to deprive it of precedential effect.[1] *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93-94 (1979); *United States* v. *Munsingwear*, 340 U.S. 36, 39 (1950); *Duke Power Co.* v. *Greenwood*, 299 U.S. 259, 267 (1936). Each of the cases cited by NADA so holds. See *County of Los Angeles* v. *Davis*, 440 U.S. 625, 634 n.6 (1979); *Preiser* v. *Newkirk*, 422 U.S. 395, 403-404 (1975); *DeFunis* v. *Odegaard*, 416 U.S. 312, 320 (1974). The rationale set forth in *Munsingwear* for vacating the lower court decision when a case has become moot applies with particular force here. The administrative process should not be saddled with the uncertainty created by the Ninth Circuit's decision when there has been no opportunity for final review of that decision on its merits.

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[1] Rather than itself resolve this issue, the Court may wish to vacate the judgment and direct the court of appeals to determine on remand whether the case is moot.

Should the Court determine to proceed, we offer the following reply to the arguments on the merits presented by respondent and amicus curiae.

2. Francis Ford and NADA do not dispute that the Commission, like other administrative agencies, has authority to articulate in adjudicatory proceedings arguably novel statutory interpretations of widespread effect. Rather, they assert that the Commission's exercise of that authority was an abuse of discretion.

Notwithstanding the characterizations by Francis Ford and NADA, the court of appeals held that the Commission's use of adjudication instead of rulemaking exceeded its authority only because the Commission's decision articulated arguably new law of widespread application. This Court has ruled, however, that broad precedential effect, which is common to many adjudications, does not demonstrate action in excess of authority or an abuse of discretion. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 200-203 (1947); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-295 (1974).

3. Assuming, contrary to what its opinion says, that the court of appeals relied upon other factors in requiring the Commission to proceed by rulemaking, it identified no statutory or decisional principle, and no distinction from numerous other precedent-making adjudications, to support a conclusion that the Commission abused its discretion.

NADA mischaracterizes the Commission's action as a "devious process" (NADA Br. at 9) calculated to create an adjudicatory precedent against Francis Ford which could then be used, as expressly authorized by Congress in Section 5(m)(1)(B) of the Federal Trade Commission Act, 15 U.S.C. 45(m)(1)(B), to obtain civil penalties against other automobile dealers who might refuse to return surpluses to their customers. It erroneously asserts that the Commission

settled cases against Ford Motor Co. and Ford Motor Credit Corp. (and later, against six other parties, including two automobile dealers), but denied Francis Ford the opportunity to settle, instead insisting that the charges be tried so as to establish a litigated precedent. The court of appeals, however, did not even suggest, let alone premise its holding upon, this allegation.[2] Moreover, allegedly abusive rejection in an adjudication of a proffered consent order is not a basis for requiring rulemaking.

Similarly, NADA's unsupported allegation that the Commission's attempt to promulgate a rule while denying NADA's members the procedures of Section 18 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. IV) 57a, is of no avail to Francis Ford, which had the full rights of an adjudicatory respondent. NADA argues that in a rulemaking proceeding it could have participated as an interested person, while in the *Francis Ford* adjudication intervention by it was foreclosed. This observation not only conflicts with the record but is irrelevant to the choice between rulemaking and adjudication.[3]

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[2]The record in the court of appeals shows that Francis Ford submitted a proposed consent order (not accepted by complaint counsel) to the administrative law judge prior to trial. The law judge concluded that the proposed order was so "vague" that "[t]he Commission could never enforce this proposed order and complaint counsel quite justifiably oppose its certification [to the Commission]" (ALJ's Order of March 21, 1978, contained in Francis Ford's Excerpt of Record before the Ninth Circuit at 41-42). The Commission's Rules of Practice permit a matter to be withdrawn from adjudication only if both sides have signed a consent agreement (16 C.F.R. 3.25(c)) or if the respondent has offered a properly drawn consent agreement and the administrative law judge concludes there is a "likelihood of settlement" (16 C.F.R. 3.25(d)).

[3]NADA did not petition for review of the Commission's alleged denial of intervention, and Francis Ford was not prejudiced by it. Moreover, NADA was not excluded from this adjudication. NADA's own brief (at 7 n.6) concedes that it was granted limited rights of intervention, and invited by the Commission to reapply for expanded

As we have shown (Pet. 13-14), Congress has expressly provided in Section 5(m)(1)(B) of the Federal Trade Commission Act, 15 U.S.C. 45(m)(1)(B), that the Commission, after having determined in an adjudication that particular conduct constitutes an "unfair or deceptive act or practice," may subsequently seek civil penalties against others not party to the original adjudication who violate its holding with actual knowledge thereof. Section 5(m)(1)(B) thus provides express legislative reaffirmation of the Commission's authority to render novel interpretations of Section 5 (15 U.S.C. (& Supp. IV) 45) in adjudications that will have widespread effect. Whatever challenges may be raised to a civil penalty suit charging a nonparty with knowing violation of the holding of an earlier adjudication, surely such

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rights should circumstances change (as they later did when Ford Motor Co. and Ford Motor Credit Corp. signed consent agreements, leaving Francis Ford alone in the adjudication). This admission (like Professor Davis' repudiation of the Ninth Circuit's reliance on his treatise (Pet. 16) provides further confirmation of the inaccurate treatment of the record in the Ninth Circuit's opinion, which, on the subject of NADA's intervention, recites simply that "[t]he National Association of Car Dealers [*sic*] sought to intervene to protect the interests of its members but was not allowed to do so" (Pet. App. 2a).

NADA lamely explains (Br. 8 n.6) that it felt inhibited from exercising the intervention rights granted, and the broader right offered because the Commission had indicated that NADA's participation should be limited to issues affecting the conduct of nonparty dealers. But NADA had asked only to intervene concerning the acts and practices of unidentified Ford dealers (NADA's Motion to Intervene, April 1, 1976), not concerning Francis Ford, which could obviously defend its own practices. Moreover, if NADA had genuinely felt its members' interests threatened by the adjudication against Francis Ford, the Commission's invitation to apply for the right to protect those interests obviously provided the opportunity to reapply, or at least to offer a brief amicus curiae before the Commission on the legal issues. Instead, NADA deliberately absented itself from the adjudication against Francis Ford before the Commission, then appeared before the court of appeals arguing that it had been denied an opportunity to participate before the Commission. Cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553-554 (1978).

challenges may be raised only by the defendant in the later suit.[4] Francis Ford has had its day in court; it has received a full hearing on the merits, although the Commission's holding has yet to be reviewed on those merits by the court of appeals.

Finally, NADA is simply wrong in asserting that the pendency before the Commission of a proposed Creditors' Remedies Rule (40 Fed. Reg. 16347 (1975)) renders this adjudication an abuse of discretion. The Commission held in this adjudication that it was an unfair practice under Section 5 of the Federal Trade Commission Act for Francis Ford to withhold surpluses to which its customers were entitled under state law. The treatment of surpluses under state law is not addressed by the proposed Creditors' Remedies Rule, and NADA does not suggest that it is. The Commission elected to address this issue in adjudication, rather than by rulemaking, because it believed the duty to repay surpluses was sufficiently well-established to justify a potential action for consumer redress for its breach, under Section 19(a)(2) of the Federal Trade Commission Act, 15 U.S.C. 57b(a)(2) (Pet. App. 31a-32a). A rule cannot provide for pre-rule consumer redress (Pet. 2, 20). Only adjudication has enabled the Commission to achieve both redress and orders remedying unlawful withholdings of surpluses.

Theoretically, the Commission could have addressed the legal issue of withholding surpluses by rulemaking. But this would have been at the expense of the more than 10,000 consumers who have to date received refunds of more than

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[4]To date, two district courts have ruled in civil penalty actions under Section 5(m)(1)(B), that a party charged with violating an earlier holding of the Commission may contest the legal sufficiency of that holding de novo. United States v. *Braswell, Inc.*, [1981-82] Trade Cas. para. 64,325 (N.D. Ga.), aff'd, No. 81-9666 (11th Cir. Mar. 3, 1982); *United States* v. *Allied Publishers Service, Inc.*, No. CV-F-81-46 (E.D. Cal. Aug. 10, 1982).

$2.5 million in surpluses withheld from them by the eight parties who settled (Pet. 3-4). Discretion necessarily implies the authority to choose among two or more allowable alternatives. It can hardly be an abuse of discretion for the Commission both to correct an unfair practice under Section 5 and to provide a basis for consumer redress under Section 19, 15 U.S.C. 57b, thus satisfying two agency mandates rather than one.

4. Quite apart from mootness concerns, Francis Ford's alleged cessation of business in no way diminishes the general importance of this case. The Ninth Circuit's decision, if left to stand, will cast doubt upon the validity of adjudicatory proceedings of the Commission and all other agencies with adjudicatory and rulemaking responsibilities.[5] This shadow over a fundamental principle of administrative law—agencies' authority to choose between rulemaking and adjudication—should be dispelled. Francis Ford had a full adjudication concerning conduct that seems patently unfair—withholding from consumers surpluses earned on repossession. It is entitled to have the merits of that adjudication reviewed by the court of appeals, but it is not entitled to immunity from Section 5 until such conduct is condemned in a rulemaking proceeding.

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[5]Moreover, in this particular case, the eight consent agreements, signed by the Commission with other parties to the case, may be subject to demands for reopening under most favored corporation clauses should a final judgment be rendered holding that the Commission lacks authority to proceed against a company for unlawful withholding of statutory surpluses, the same practice covered by the orders.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the writ of certiorari should be granted.

Respectfully submitted.

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FEDERAL TRADE COMMISSION, PETITIONER

v.

FRANCIS FORD, INC.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF ON MOOTNESS

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TABLE OF AUTHORITIES

	Page
Cases:	
Adickes v. S.J. Kress & Co., 398 U.S. 144 (1970)	3
Doyle v. F.T.C., 356 F.2d 381 (5th Cir. 1966)	4
Giles v. Maryland, 386 U.S. 66 (1967)	3
Mechling Barge Lines, Inc. v. United States, 368 U.S. 324 (1961)	6
United States v. Bestline Products Corp., 412 F. Supp. 754 (N.D. Cal. (1976)	4
United States v. Concentrated Phosphate Export Assn., 393 U.S. 199 (1968)	5
United States v. Munsingwear, 340 U.S. 36 (1950)	7
Statutes and Regulations:	
5 U.S.C. § 504	5
15 U.S.C. 45(m)(1)(B)	7

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1114

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRANCIS FORD, INC.

RESPONDENT'S BRIEF ON MOOTNESS

This Court has requested Francis Ford, Inc.'s ("Francis Ford") response on the issue of mootness first raised by the Federal Trade Commission's Reply Brief (at 1-2) following a suggestion to that effect made by Amicus Curiae. National Automobile Dealers Association ("NADA") in its Brief in Opposition (at 15-16). The only basis for the suggestion is NADA's unsupported

assertion that Francis Ford is out of business.

Francis Ford and its controlling shareholders, officers, and directors protest any suggestion that this case may be moot. The following will point out some of the reasons for this objection, but will be kept brief as the issue does not warrant great length.

1. Francis Ford is not "out of business." It is a corporation in good standing, organized and existing under the laws of the state of Oregon. It is as responsible today for the disposition of repossessed cars both to its recourse lenders, including Ford Motor Credit Corporation and a local bank, and to the consuming public, as it was in February 1976. Nothing has happened to release it or its principals from these responsibilities.

Moreover, the suggestion of mootness goes beyond any evidence in the record and ignores this Court's rule prohibiting argument from the addition of new or different evidence that is

not part of the certified record. Adickes v. S.J. Kress & Co., 398 U.S. 144, 157-58, n. 16 (1970). To the extent that this Court's request to Francis Ford for a response may be deemed a request that it supply the Court with supervening facts, if any, Giles v. Maryland, 386 U.S. 66, 74, 80 (1967), then this brief should be deemed to be Francis Ford's response that the case is not moot because it is not out of business.

2. Even if Francis Ford were no longer responsible for repossessions, the case would not be moot. The Commission's Order was binding on Francis Ford and its successors and assigns. Commission's Order, Petition, App. D. at 58a. While no such successors now exist, any sale of its business would be subject to the Cease and Desist Order.

Additionally, while Francis Ford is the only named respondent involved in this appeal, the Commission's Cease and Desist Order applies

with equal force to regulate all persons connected with Francis Ford. The order applies specifically to:

> "... its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the extension and enforcement of motor vehicle retail credit obligations, and in connection with the disposition of repossessed motor vehicles, in or affecting commerce (as "commerce" is defined in the Federal Trade Commission Act, as amended) ... ." Commission's Order, Petition, App. D., at 62a.

Doyle v. F.T.C., 356 F.2d 381, 384 (5th Cir. 1966) (FTC orders are automatically binding on the officials of a corporation responsible for its affairs); United States v. Bestline Products Corp., 412 F. Supp. 754, 764-65 (N.D. Cal. 1976).

Thus, even if through some future happenstance Francis Ford had no further interest in the case on its own behalf, its officers, agents, employees, and others connected with it would have the same economic

interest in pursuing this appeal diligently in its name if they intended ever to be involved again in retail motor vehicle sales. United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 202-03 (1968) (case is not moot because the dissolved association's members were also prohibited from future activity).

3. Francis Ford itself has a strong economic interest in pursuing this case to an ultimate and favorable conclusion, regardless of the impact of the Commission's Order on the future business activities of Francis Ford, its officers, and related persons. If it is successful on this appeal, Francis Ford has the right to seek recovery of its costs, legal fees, and other expenses of defending this matter over the period which now already spans almost seven years. See, 5 U.S.C. § 504, which provides, in relevant part, that:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the

> United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances made an award unjust.

4. Finally, the Commission suggests that if the case is now moot, it would be appropriate to roll the proceedings back to vacate the Ninth Circuit decision and leave the Commission's Cease and Desist Order standing. Petitioner's Reply Brief, at 2. This is unfair. In United States v. Munsingwear, 340 U.S. 36, 39-40 (1950), the Court said:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. ... That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the

statutory scheme was only preliminary. 340 U.S. at 39-40.

Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 329-30 (1961) (Munsingwear rule applies in administrative cases).

Although the Commission seeks to remove "uncertainty" in the administrative process it claims this case has created, id. at 2, the Commission does not suggest that its Cease and Desist Order be vacated. But if Francis Ford were unable to pursue this appeal, then the Commission's Order, which the Ninth Circuit rejected, would be reinstated. Not only would such a result be unfair to Francis Ford and its related personnel, but it also subjects the entire retail automotive sales industry to the impact of a Cease and Desist Order that the Ninth Circuit has invalidated. See, e.g., Section 5(m)(1)(B) of the Federal Trade Commission Act, 15 U.S.C. 45(m)(1)(B); NADA Brief in Opposition, at 9. NADA, through its

efforts on appeal as Amicus Curiae on behalf of the members of the industry who may be bound by any final Cease and Desist Order against Francis Ford, ensures the issues raised in this appeal will be diligently and completely litigated.

DATED this 26 day of October, 1982.

Respectfully submitted,

ESLER & SCHNEIDER

Michael J. Esler

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No. 82-24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION,
Petitioner

v.

FRANCIS FORD, INC.,
Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF IN OPPOSITION ON BEHALF OF *AMICUS CURIAE* THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION

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QUESTION PRESENTED

Whether, under the special circumstances of this case, the Federal Trade Commission abused its discretion in attempting to establish, through adjudication against one automobile dealer rather than through rulemaking, a nationwide standard for the expenses a secured party may charge to a defaulting debtor for retaking, holding, and selling collateral.*

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* The parties in the court of appeals were the Federal Trade Commission and Francis Ford, Inc. The National Automobile Dealers Association appeared as amicus curiae in the court of appeals. This brief is filed by consent of the parties. The written consents are being lodged at the time this brief is filed.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Interest of Amicus Curiae	2
Statement	2
Summary of Argument	5
Argument	6
Conclusion	16
Appendix	1a

TABLE OF AUTHORITIES

	Page
CASES:	
Abbott Laboratories v. Gardner, 387 U.S. 136	12,15
Bahat v. Sureck, 637 F.2d 1315	13
Chrysler Corp., 97 F.T.C. 107	3
Chuck Olson Chevrolet, 96 F.T.C. 37	3
County of Los Angeles v. Davis, 440 U.S. 625	16
DeFunis v. Odegaard, 416 U.S. 312	16
Ford Motor Co., 93 F.T.C. 402	3
General Motors Corp., 95 F.T.C. 825	3
NLRB v. Bell Aerospace Co., 416 U.S. 267	5,6,7,11
NLRB v. Wyman-Gordon Co., 394 U.S. 759	5,6,11
Patel v. INS, 638 F.2d 1199	12,13
Preiser v. Newkirk, 422 U.S. 395	16
Ruangswang v. INS, 591 F.2d 39	12
SEC v. Chenery Corp., 332 U.S. 194	5,7,11
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100	8
STATUTES AND REGULATIONS:	
Federal Trade Commission Act	
Section 5, 15 U.S.C. § 45	2
Section 5(m)(1)(A), 15 U.S.C. § 45(m)(1)(A)	13
Section 5(m)(1)(B), 15 U.S.C. § 45(m)(1)(B)	*passim*
Section 18, 15 U.S.C. § 57a	6,9,10

	Page
Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. 93-637, 88 Stat. 2183	10
8 C.F.R. 212.8(b)(4)	12
16 C.F.R. 3.25(f)	3
Uniform Commercial Code § 9-504	5
MISCELLANEOUS:	
K. Davis, *1982 Supplement to Administrative Law Treatise*	13,14
40 Fed. Reg. 16,347 (April 11, 1975)	4
H.R. Rep. No. 1107, 93d Cong., 2d Sess., Reprinted in 1974 U.S. CODE CONG. & AD. NEWS	11

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BRIEF IN OPPOSITION ON BEHALF OF *AMICUS CURIAE* THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Pet.App. 1a-5a) is reported at 673 F.2d 1008. The opinion and order of the Federal Trade Commission (Pet.App. 13a-73a) and initial decision of the Administrative Law Judge (Pet.App. 74a-139a) are reported at 94 FTC 564.

JURISDICTION

The judgment of the court of appeals (Pet.App. 6a) was entered on August 24, 1981. A petition for rehearing and a suggestion for rehearing *en banc* were denied on April 5, 1982. (Pet.App. 7a). The petition for a writ of certiorari was filed on July 6, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTEREST OF AMICUS CURIAE

The National Automobile Dealers Association ("NADA") is a trade association of approximately 20,000 motor vehicle dealers. NADA's members are vitally affected by the FTC decision vacated by the court of appeals because the FTC can enforce (and has announced that it intends to enforce) the principles of the decision against dealers pursuant to 15 U.S.C. § 45(m)(1)(B).

STATEMENT

1. On February 10, 1976, the Federal Trade Commission ("FTC") issued an administrative complaint pursuant to section 5 of the FTC Act, 5 U.S.C. § 45, against Ford Motor Company ("Ford"), Ford Motor Credit Company ("Ford Credit"), and Francis Ford, Inc. ("Francis Ford"), a Ford dealer. On the same day, the Commission issued nearly identical complaints against Chrysler Corporation, Chrysler Credit Corporation, and a Chrysler dealer, and against General Motors, General Motors Acceptance Corporation, and a General Motors dealer. The complaint in this action charged, *inter alia*, that respondents and "other Ford repurchase dealers" violated section 5 of the FTC Act by allegedly failing to properly calculate the surplus realized from the sale of repossessed vehicles and by failing to pay the surpluses to defaulting buyers.

NADA moved immediately after issuance of the complaint to intervene in the three proceedings. The Administrative Law Judge denied NADA's petition for intervention, granting the association the right to participate only with respect to the scope of any proposed order and its effect on the repossession practices of the unnamed dealers. The Commission reviewed and affirmed this decision.[1]

Prior to the commencement of the administrative hearings, Ford and Ford Credit settled with the FTC. Ford agreed to impose upon its franchisees a formula for accounting for

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[1] In its decision, the court of appeals found that NADA had been denied the right to intervene in the administrative action. (Pet.App. 2a). The FTC challenges this finding in its petition. (Pet. 19, n.15). As will be discussed in note 6, *infra*, the court of appeals was correct.

surpluses and deficiencies arising from the sale of repossessed vehicles. The formula does not allow dealers to charge to the defaulting debtor overhead and other indirect expenses related to the repossession.[2] The order also requires Ford to audit its dealers to determine their compliance with the order.[3]

Subsequently, the FTC settled its actions against General Motors, General Motors Acceptance Corporation and the nominal General Motors dealer and against Chrysler Corporation, Chrysler Credit Corporation, and the nominal Chrysler dealer. The orders in those cases contain provisions similar to those in the Ford agreement. They require the manufacturers to impose upon their franchisees a formula for accounting for surpluses and deficiencies arising from the sale of repossessed vehicles which does not allow dealers to charge for overhead and other indirect expenses and which requires the manufacturers to audit their dealers' compliance with the order.[4]

2. The Commission proceeded to administrative hearings solely against Francis Ford. Francis Ford had objected to the Ford settlement by a motion opposing the withdrawal of the matter from adjudication with respect to the Ford respondents. It also sought to settle the matter itself through another motion to the Administrative Law Judge. Both motions were denied.

On January 4, 1979, the Administrative Law Judge entered a decision. (Pet.App. 74a-139a). The decision was affirmed by the Commission on September 21, 1979. (Pet.App. 13a-72a). The Commission found it to be an unfair practice to charge the defaulting debtor with overhead and indirect expenses attributable to the repossession in calculating a surplus or deficiency upon the sale of a repossessed vehicle. (Pet. App. 55a-56a).

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[2] Under its rules, the FTC determines whether to accept the tendered settlement agreement. If it accepts the agreement, it is published in the Federal Register, and interested parties may comment within 60 days. 16 C.F.R. § 3.25(f). Pursuant to the FTC rules, NADA strongly objected to the Ford consent order in extensive written comments filed with the FTC.

[3] Ford Motor Co., 93 F.T.C. 402, 406-21 (1979).

[4] The settlements occurred subsequent to the administrative hearings in this case. General Motors Corp., 95 F.T.C. 825, 831-53 (1980); Chuck Olson Chevrolet, 96 F.T.C. 37 (1980); Chrysler Corp., 97 F.T.C. 107, 139 (1981). Pursuant to FTC rules, NADA strongly objected to these orders.

Of particular significance is an attachment to the Commission decision entitled "Synopsis of Determinations for 15 U.S.C. § 45(m)(1)(B), Ford Motor Company, et al., Docket No. 9073." (*See* Pet.App. 54a-56a). The synopsis states that it is unfair and unlawful under section 5 of the FTC Act for a party to fail to account for and pay to a defaulting debtor a surplus. The synopsis also states that it is unfair and unlawful for a dealer to fail to use a specified accounting procedure which gives certain credits to the defaulting debtor and which prohibits certain charges (primarily overhead and indirect expenses) to the defaulting debtor.

3. The synopsis was prepared to apply the principles of the decision to other automobile dealers in civil penalty actions against those dealers pursuant to 15 U.S.C. § 45(m)(1)(B). (*See* Appendix to this Brief). That section provides that the Commission may commence a civil penalty action against anyone who engages in an act or practice found to be unlawful in a final cease and desist order if that person has actual knowledge that the act or practice is unlawful.

4. During the time the Commission prosecuted this case, it was also considering (and is still considering) a rulemaking proceeding concerning credit practices. 40 Fed. Reg. 16,347 (April 11, 1975). One part of the credit practices proceeding involves the value to be given to repossessed collateral in the calculation of a surplus to which the defaulting debtor is entitled or a deficiency for which the defaulting debtor is liable. All matters considered in this proceeding could easily have been considered in the rulemaking proceeding.

5. Francis Ford filed a Petition for Review of the FTC decision with the Court of Appeals for the Ninth Circuit.[8] In

[8] NADA appeared before the court of appeals as amicus curiae and presented a brief on the merits. NADA presented two arguments: (1) The Federal Trade Commission erred in holding that a secured party could not charge the defaulting debtor for the indirect expenses and costs of retaking, holding, and selling the collateral, and (2) the Commission erred in proceeding by adjudication instead of rulemaking to attempt to establish a national standard for the expenses that may be charged a defaulting debtor by the secured party.

vacating the Commission's order (Pet.App. 6a), the court held that the FTC erred in proceeding by adjudication against only one dealer to change a wide-spread industry practice. The court held that the Commission's order, in effect, rewrites Uniform Commercial Code §9-504, and therefore the agency should have proceeded by rulemaking. (Pet.App. 4a-5a).

The FTC filed a petition for rehearing and a suggestion for rehearing *en banc*. Francis Ford opposed the petition and suggestion with NADA appearing as amicus curiae. The court denied the petition for rehearing and rejected the *en banc* suggestion. (Pet.App. 7a). The FTC then filed this petition for certiorari.

6. Sometime after the decision of the court of appeals, Francis Ford went out of business. The corporation is still in existence; it has not been liquidated. However, the corporation no longer does business, according to information available to NADA.

SUMMARY OF ARGUMENT

The decision of the court of appeals is correct. It is not in conflict with any decision of this Court, but instead is supported by previous decisions of this Court. Review of the decision is not warranted.

In its petition, the FTC erroneously portrays the court of appeals decision as a radical departure from established precedent which will unreasonably burden the administrative process. That is not the case. The court merely applied a doctrine that was enunciated by this Court: The decision to proceed by adjudication or by rulemaking is one to be left to the informed discretion of the administrative agency, but there are situations where the agency's reliance on adjudication can constitute an abuse of discretion. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). Based upon that doctrine, the Ninth Circuit correctly found that the decision of the Federal Trade Commission to proceed by adjudication

against one dealer to establish a nationwide standard without observing the safeguards of rulemaking was improper.

Not only is the decision in accord with the principles enunciated by this Court, it also is in accord with the Federal Trade Commission Act. Congress granted substantive trade regulation rulemaking authority to the FTC. 15 U.S.C. § 57a. In doing so, it established vital safeguards to protect the rights of interested and affected parties. Congress would not have established such a power with important safeguards for interested persons if it had envisioned that the FTC would circumvent rulemaking through an adjudicative proceeding, the avowed purpose of which was to establish an industry-wide rule which would later be enforced against non-respondents pursuant to 15 U.S.C. § 45(m)(1)(B).

The decision is not unworkable, as claimed by the FTC in its petition. Contrary to the claim of the FTC that there must be a "bright line" between adjudicative cases and rulemaking, the doctrine that the decision to proceed by adjudication or rulemaking is to be left to the informed decision of the agency necessarily implies that each agency decision can be reviewed on its merits. For this reason, this Court has refrained from establishing a "bright line", a fact noted by the court of appeals. (Pet.App. 3a).

Finally, because Francis Ford is out of business, the circumstances of this case justify the conclusion that Francis Ford will never again engage in the acts about which the FTC complains. The case is moot and should not be reviewed by this Court.

ARGUMENT

1. The Federal Trade Commission portrays the court of appeals' decision as a major departure from prior law which will adversely affect administrative proceedings. There is no basis for the contention. The court of appeals' decision is consistent with (and correctly cites as precedent) prior decisions of this Court.

As the Federal Trade Commission states in its petition (Pet. 7), this Court has repeatedly held that the decision to proceed by adjudication or by rulemaking is one to be left to the informed discretion of the administrative agency. *NLRB v. Bell Aerospace Co., supra*, 416 U.S. at 293; *NLRB v. Wyman-*

Gordon Co., supra, 394 U.S. at 772 (Black, J. concurring); *SEC v. Chenery Corp.*, 332 U.S. at 203. However, this Court has gone on to hold that "[T]here may be situations where the [agency's] reliance on adjudication would amount to an abuse of discretion or a violation of the [Administrative Procedure] Act." *NLRB v. Bell Aerospace Co., supra*, 416 U.S. at 294. The court of appeals did not ignore the doctrine enunciated by this Court in deciding this case; it depended on it and applied it. The court carefully considered the facts of this case to determine whether the Commission had abused its discretion in proceeding by rulemaking. It determined that it had, and it vacated the decision.

If this Court's statement in *Bell Aerospace* that there may be a situation in which an agency's decision to proceed by adjudication can be an abuse of discretion is to have any meaning, it must be applied in this case. This case is a prime example of an administrative agency's abuse of the substantial power given it by Congress and of its failure to respect the safeguards of rulemaking established by Congress.

The events of this case make clear that the purpose of this proceeding was to establish a national standard for the expenses that may be charged to a defaulting debtor by the secured party upon sale of the collateral without giving interested and affected parties the rights of participation they would have in rulemaking. The Commission first settled its action against Ford and Ford Credit. The consent order imposed minimal burdens on Ford. The company's major obligation was to require its franchisees to implement a specific formula for calculating the surplus or deficiency arising from the sale of repossessed collateral. The order also required the manufacturer to audit a specified number of dealers to report to the Commission those dealers who are not utilizing the required accounting procedure. The Commission then proceeded with its adjudicative proceeding against Francis Ford, after refusing its offer to settle and after refusing the request of NADA to intervene in the proceeding.[6]

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[6] Despite the Commission's attempt to contend in its petition that the court of appeals was wrong when it found that NADA was denied inter-

(footnote continues)

The FTC announced that its decision in the Francis Ford action would be enforced against other automobile dealers in civil penalty proceedings in the United States District Court pursuant to 15 U.S.C. § 45(m) (1) (B):

> In addition, we have appended a synopsis summarizing our holding in this matter, so as to facilitate application of the principles articulated herein to any party that may engage in similar practices, as con-

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(footnote continued)

vention rights (Pet. 19, n.15), the court was correct. NADA applied for full intervention rights on the issues of liability and the scope of any order entered. NADA was granted only the right to participate with respect to the scope of the order despite the allegations against unnamed dealers. The Commission did invite NADA to renew its motion if the rights of NADA's members (i.e., the unnamed dealers) were not protected. However, in so ruling, the Commission made clear that NADA's intervention would only be as to unnamed dealer conduct and that the association would have no right to present evidence on the issues relating to named respondent conduct.

By allowing NADA the right to participate only with respect to the scope of the order, the FTC gave NADA no rights to protect its members. That is because under 15 U.S.C. section 45(m)(1)(B), the Commission does not enforce the terms of an *order* against non-respondents, it enforces the principles of *decisions* against non-respondents. By refusing NADA the right to participate with respect to the issues on liability, the Commission prevented NADA from participating with respect to any decisions which would later be enforced against its members. When Ford and Ford Credit settled, what little rights NADA had in the proceeding evaporated because that settlement provided for an imposition of the terms of the consent order on unnamed dealers. NADA was still concerned with the scope of any decision to be entered because of the possibility of enforcement of the principles of that decision against NADA's members. However, NADA had been denied rights to participate with respect to liability even when unnamed dealer conduct was in the case. Once unnamed dealer conduct had been removed from the case, because of the Ford and Ford Credit settlement, it was futile to apply for rights of intervention to defend Francis Ford's practices, given the Commission warning that NADA could not present evidence on named respondent conduct. This court has never required one to perform a futile act to protect its rights. *See, e.g. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100,146 n.15 (1969).

templated by 15 U.S.C. § 5(m) (1) (B) [sic]. (Pet.App. 43a).[7]

Thereafter, the FTC settled the General Motors action and the Chrysler action entering consent orders with all respondents in those actions. The consent orders required those manufacturers to impose similar accounting programs on their dealers and to establish similar reporting requirements.

The aim of the FTC throughout this whole proceeding was clear. The FTC preferred to enter consent orders with the major automobile manufacturers that required the manufacturers to impose on dealers the FTC's preferred formula for accounting for surpluses from the sale of collateral. It chose to then proceed against one dealer to establish a formula through an adjudicative proceeding. The Commission would then proceed against all dealers who refused to follow the mandated formula (and who were identified through manufacturer audits) by civil penalty actions in the United States district courts pursuant to 15 U.S.C. § 45(m) (1) (B). Through this devious process, the FTC intended to establish a national standard for an entire industry's accounting practices without meaningful participation by those most able to defend current practices—the automakers and their credit subsidiaries—and without receiving input from those most concerned and most vitally affected—automobile dealers throughout the United States.

The court of appeals saw the process used by the Commission for what it was—rulemaking through adjudication and through the use of 15 U.S.C. § 45 (m) (1) (B) which does not have safeguards designed to guarantee the rights of interested persons[8]—and the Court nullified it. This was not a revolution-

[7] In a post argument Motion for Leave to File Supplemental Memorandum Consenting to Modification of Order directed to the court of appeals (at 5-6), the FTC explained the way it intended to use the synopsis against other dealers. "It is this Synopsis of the Commission's holdings which the Commission would necessarily utilize in giving notice of a 'determination of unlawfulness' as a condition precedent to seeking civil penalties for future non-compliance by third parties."

[8] 15 U.S.C. § 57a establishes the rights of interested persons in FTC rulemaking proceedings. These rights include the opportunity for all inter-

(footnote continues)

ary doctrine. Instead, it was a proper application of this Court's holding that there may be situations in which an administrative agency's decision to proceed by adjudication instead of by rulemaking is an abuse of discretion. The court recognized this as just such a situation.

2. In its petition, the FTC charges that the court's decision was inconsistent with Congressional intent as manifested in the Federal Trade Commission Act, 15 U.S.C. § 41, *et seq.* (Pet. 12). To support this proposition, the FTC cites several cases that predate the passage of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. 93-637, 88 Stat. 2183 (1975). (*See* Pet. 13-14).

The Magnuson-Moss Act contained two provisions which are pertinent here. The first is section 202 of the Act (codified at 15 U.S.C. § 57a) which establishes the FTC's trade regulation rulemaking authority and which establishes rulemaking procedures in addition to those of the Administrative Procedure Act. The second is contained in section 205 of the Act (codified at 15 U.S.C. § 45(m)(1)(B)) which allows the FTC to sue for civil penalties any third party who engages in an act or practice found in a previous FTC proceeding to be unlawful upon a showing that the third party knew the act or practice to be unlawful.

The legislative history establishes that Congress regarded the rulemaking provisions of the Magnuson-Moss Act as an important change to FTC authority and procedure. The House Committee on Interstate and Foreign Commerce discussed the importance of the rulemaking procedures:

> Your committee believes these rulemaking procedures and this scope of judicial review [as contained in the Administrative Procedure Act] may be inadequate in some cases where fundamental factual premises of a rule are at issue. Because of the

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(footnote continued)

ested persons to present their positions orally or by documentary submissions, 15 U.S.C. § 57a(c)(1)(A), and the right to cross-examine and present rebuttal under certain conditions, 15 U.S.C. § 57a(c)(1)(B).

> potentially pervasive and deep effect of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words "unfair or deceptive acts or practices", the committee believes greater procedural safeguards are necessary. Accordingly, it has fashioned the rulemaking procedures and judicial review provisions described below which we believe to be more appropriate in this context then merely relying upon provisions of sections 553 and 703 of Title 5.

H.R. Rep. No. 1107, 93d Cong., 2d. Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7702, 7727.

The FTC contends that the promulgation of 15 U.S.C. § 45(m)(1)(B) reinforces its argument that it need not proceed by rulemaking if it chooses to proceed by adjudication. It states, "By enacting this provision, Congress plainly rejected the rationale of the court of appeals in the present case." (Pet. 14).

However, if Congress meant for the FTC to circumvent rulemaking through adjudication and through subsequent use of 15 U.S.C. § 45(m)(1)(B), it never would have provided specific trade regulation rulemaking authority to the Commission with specified procedures that must be followed. Of what use are such safeguards if the FTC can ignore them at will? The answer is that Congress provided trade regulation rulemaking authority and specific safeguards because it did not intend adjudication and 15 U.S.C. § 45(m)(1)(B) to be abused as it was abused in this case. This contradicts the Commission's contention that 15 U.S.C. § 45(m)(1)(B) was designed to be used to circumvent the rulemaking provisions of the Magnuson-Moss Act when the Commission deemed it appropriate and supports the court of appeals' decision in this case.

3. In its petition, the FTC contends that the court of appeals' holding in this case is "utterly devoid of precedential support." (Pet. 14). That contention is erroneous.

As already discussed, the decision is supported by the trilogy of cases relied upon by the FTC in its petition, *Bell Aerospace*, *Wyman-Gordon*, and *Chenery*. In those cases, the Court announced the rule that, in the first instance, an adminis-

trative agency does have discretion to proceed by adjudication or by rulemaking. Those same cases make abundantly clear that such discretion is not unbounded or beyond review by the courts. The Ninth Circuit took full cognizance of those cases in carefully reviewing the FTC's exercise of discretion and found ample basis for concluding that the Commission proceeded improperly. In the absence of a statutory prohibition against judicial review, the propriety of such judicial oversight has been universally recognized and accepted. *See Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

Moreover, the decision below is an outgrowth of a previous decision in the Ninth Circuit upon which the court also relied, *Patel v. INS*, 638 F.2d 1199 (9th Cir. 1980). In that case, Patel, an alien, attempted to remain in this country pursuant to the provisions of the "investor exemption" of 8 C.F.R. § 212.8(b)(4). Patel satisfied the two expressed conditions of the regulation, but the INS refused his request based upon its decision in a previous adjudication that the investment by the alien "must tend to expand job opportunities." This requirement had originally been proposed as part of the regulation and had been abandoned.

The court of appeals nullified the decision of the INS on two grounds. First, it found that the agency should have proceeded by rulemaking. Second, it found that the INS had been sending aliens "confusing signals." *See also Ruangswang v. INS*, 591 F.2d 39 (9th Cir. 1978).

Patel is authority for the holding in this case. If anything, the FTC activities involved in this action are far more egregious than those considered in *Patel*. In *Patel*, the INS was attempting to apply, through the doctrine of *stare decisis*, a criterion established in another case. The court struck down the action because the agency was attempting to apply the adjudicative standard as a general rule.

The conduct of the FTC here goes beyond that in *Patel*. Here, the FTC agreed with Ford, General Motors and Chrysler that the manufacturers would impose an accounting standard on their dealers and would report to the FTC those who refused to abide by that standard. The FTC then sought a litigated

decision which it could then use to sue dealers who failed to comply with the accounting standard in the United States district court for a civil penalty under 15 U.S.C. § 45(m)(1)(B), just as it can sue them for violation of a trade regulation rule under 15 U.S.C. § 45 (m)(1)(A). In essence, the Commission attempted to establish a general rule that could be enforced as a trade regulation rule.[9] The court of appeals recognized the attempt and nullified it.

Finally, the FTC argues (Pet. 16) that Professor Davis in the 1982 supplement to his *Administrative Law Treatise* questioned the citation of his treatise as authority for the court of appeals' decision. It is true that Professor Davis expresses doubt that his treatise supports the broad proposition that agencies must in all circumstances proceed by rulemaking if they seek to change the law and establish rules of widespread application. But that is not what the Ninth Circuit did, and Professor Davis recognized this fact by endorsing the court's decision when limited to the unique facts involved. He wrote:

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[9] In its petition (Pet. 15), the FTC contends that the Ninth Circuit "apparently abandoned in a subsequent decision" its holding that the INS should have proceeded by rulemaking rather than adjudication, citing Bahat v. Sureck, 637 F.2d 1315 (9th Cir. 1981). Nothing could be further from the truth. In the *Bahat* case, the Ninth Circuit specifically approved and cited as an alternative holding the decision in *Patel* that the INS should have proceeded by rulemaking:

> We also agree with Patel's alternate holding that *Heitland* [the case establishing the "expanded job opportunity" criterion] was an improper circumvention of rule making procedure. In addition to the reasons cogently set forth in *Patel*, we note that the regulations of the INS are promulgated by the Commissioner, who serves under the Attorney General of the United States, while a separate agency under the Attorney General, the Board of Immigration Appeals, adjudicates individual cases. Although we agree with *Patel*, at _____n.4 that this dual delegation does not prevent adjudicatory action, we question the authority of the BIA to amend the regulation by adjudication to include essentially the same provisions that were rejected by the Commission in promulgating the regulation. It is the Commissioner who is given the primary function of promulgating regulations. That authority should not be nullified by the adjudicatory arm of the INS.

637 F.2d at 1320 [footnotes omitted]

> The support for the Ford decision lies in the *combination of* (a) the general superiority of rulemaking over adjudication for making new law, (b) the strong fact that the question whether to adopt the new law was simultaneously under consideration in a pending rulemaking proceeding, and (c) the palpable unfairness of singling out the one dealer for prosecution and denying intervention to the association representing 3,500 dealers. Such an unusual combination of factors, all pulling together in the same direction, may justify the result reached, but not its proposition that "an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application."[10]

K. Davis, *1982 Supplement to Administrative Law Treatise* § 7:25, at 183.

4. The FTC's petition contends that the court of appeals' decision is unworkable. (Pet. 16). It contends that there must be a "bright line" by which an agency can determine whether it should proceed by rulemaking or proceed by adjudication. Because the court of appeals did not establish a bright line, it is argued, the decision is incorrect. However, this Court, as recognized by the court of appeals in this case (Pet.App. 3a), has avoided drawing a bright line as to when adjudication or rulemaking may be used.

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[10] The Commission argues (Pet. 18, n.14) that Professor Davis's support for the decision is based on factors that were not really present in this case. However, the Commission's argument is illusory. First, the rulemaking proceeding does address a question that is very similar and which is related to the issue involved here—the value to be credited to the defaulting debtor for repossessed collateral. That value depends upon the expenses incurred (the issue in this case), an issue the Presiding Officer actually considered in the rulemaking proceeding in a report the Administrative Law Judge would not admit into evidence. (Pet. App. 35a). Second, the court of appeals was correct in finding that NADA was denied intervention. See note 6, *supra*. Finally, Francis Ford was singled out. The court of appeals found that the FTC admitted that the practices about which the FTC complained were industry-wide. (Pet. App. 4a). The FTC singled out Francis Ford as the dealer against whom it would proceed to establish its rule.

The only way that a court can determine whether an agency has abused its discretion is to examine each case on its own merits. The Ninth Circuit did precisely that and correctly concluded that in the unique circumstances of this case, the FTC acted improperly.

5. The FTC claims that the court did not find an abuse of discretion and that there is no basis on which it could find an abuse of discretion. (Pet. 12-20). However, the validity of the decision of the court of appeals should not rest upon whether court's concluding paragraph uses the magic words "abuse of discretion." In concluding that the FTC exceeded its authority, the court discusses the exercise and abuse of agency discretion and the leading cases on that subject (*Bell Aerospace, Chenery,* and *Patel*). (Pet. App. 2a-4a). It is therefore disingenuous for the FTC to claim that the court did not base its decision on the agency's abuse of discretion.

Moreover, the court is correct when it stated that the FTC exceeded its authority by proceeding as it did. Administrative agencies have authority to proceed according to informed discretion. If they abuse that discretion, then they exceed that authority.

Furthermore, there was a substantial record upon which the court could base its finding that the FTC exceeded its authority in this case. What the FTC attempted to do was to create a rule without providing the safeguards established by Congress for rulemaking.[11] The court of appeals recognized this improper attempt and nullified it as an abuse of discretion. Its action was proper and entirely consistent with the Administrative Procedure Act and precedent of this Court. *See Abbott Laboratories v. Gardner, supra,* 387 U.S. 136.

6. Finally, this matter is moot. Francis Ford is out of business. The corporation has not liquidated, but it does no business.

This Court has often held that a case is moot if subsequent events make it absolutely clear that the allegedly wrongful behavior sought to be enjoined cannot reasonably be expected

[11] *See supra* pp. 6-10.

to recur. *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Preiser v. Newkirk*, 422 U.S. 395 (1975); *DeFunis v. Odegaard*, 416 U.S. 312 (1974). Francis Ford's exit from business makes it absolutely clear that it cannot engage in the allegedly wrongful behavior. This case is thus moot, and further consideration is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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15 U.S.C. § 45(m)(1)(B)

(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.